Honor.[59] Xavier Alvarez was indicted under the Stolen Valor Act for holding himself out as a Medal of Honor recipient at a public meeting, at which he was present as a member of a government body:[60] Alvarez had not in fact been awarded the Medal of Honor, and the Court recognized that his statement was nothing but an "intended, undoubted lie."[61] Alvarez challenged his indictment on the grounds that the Stolen Valor Act violated his First Amendment right to free speech.[62] The purpose of the Act was to "establish[] an award so the Nation can hold in its highest respect and esteem" individuals that defended the safety of this country "with extraordinary honor."[63] The Court stated that this was "a legitimate Government objective" that Congress was "right and proper" to pursue.[64] Nevertheless, when subjected to the "sometimes inconvenient principles of the First Amendment," the Court concluded that the Act impermissibly infringed upon Alvarez's constitutional rights.[65] "[C]ontent-based restrictions on speech [must] be presumed invalid," and due to the "probable, and adverse, effect of the Act on freedom of expression," the Court held that the government had not overcome this presumption.[66] Because there was no limiting principle on when the government could punish defendants for making such false statements, the government's "censorial power" would chill the fundamental freedoms of "speech, thought, and discourse" that are necessary to the operation of a democracy.[67]

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[59] See United States v. Alvarez, 567 U.S. 709 (2012).
[60] Id. at 713-14.
[61] Id. at 714-15.
[62] Id. at 714.
[63] Id. at 715.
[64] Id. at 715.
[65] Id. at 715-16.
[66] Id. at 716-17, 722-23.
[67] Id.

Though the Alvarez Court did not say that all false statements fall within the ambit of the right to free speech,[68] the Court did consider several constitutional obstacles that must be overcome before limiting even false speech.[69] Notably, some of the obstacles that the Justices raised ostensibly do not apply to deepfakes, given their unique nature and characteristics. Still, some of the relevant constitutional limits in Alvarez loom large in the debate surrounding current deepfake laws' validity.

i. Resolved by the Nature of Deepfakes

a. Counterspeech

To begin with, Justice Kennedy, writing for a plurality of the Court, offered what has become a common argument for disallowing limitations on speech: "[t]he remedy for speech that is false is speech that is true."[70] The "counterspeech doctrine" traces its roots back to Justice Brandeis' concurring opinion in Whitney v. California.[71] As a member of the Communist Labor Party, Whitney was convicted of assembling to advocate for a violent overthrow of the government.[72] Despite concurring with the outcome -- which was later overruled by Brandenburg v. Ohio[73] -- Brandeis staunchly defended that free speech extended to critiques of the government, even those that may be proven untrue.[74] Justice Brandeis argued that "[i]f there

[68] Rather, the Court recognized that "there are instances in which the falsity of speech bears upon whether it is protected," and merely rejected "the notion that false speech should be in a general category that is presumptively unprotected." Id. at 721-22.
[69] Id. at 726-29 (analyzing when speech restrictions may be constitutional and how the Stolen Valor Act mapped onto these considerations).
[70] Id. at 727.
[71] David L. Hudson Jr., Counterspeech Doctrine, **Middle Tenn. St. Univ.: The First Amendment Encyclopedia** (2017).
[72] Whitney v. California, 274 U.S. 357, 360-63 (1927).
[73] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).
[74] Whitney, 274 U.S. at 376 (Brandeis, J., concurring).

be time to expose through discussion, the falsehoods and fallacies . . . the remedy to be applied is more speech, not enforced silence."[75]

In Alvarez, the Court proffered that, if Congress' interest in passing the Stolen Valor Act was to make clear who had and who had not been awarded military honors, the government could maintain a database that lists every recipient. This, the Court said, would counteract fictional claims like Mr. Alvarez's.[76] However, this is well beyond the realm of possibility in the context of deepfakes.[77] Though it would already be hardly conceivable to maintain a government database of every portrayal of a candidate that can be used as a fact-checking backstop, it is considerably more unfathomable to maintain a database of every image or video that a candidate could possibly be inserted into.[78] Therefore, there simply is no way to ensure the accuracy of an image or video in the same way that the Court envisioned in Alvarez.[79]

Though a database is unique to the type of claim made in Alvarez, even in comparison to other types of false statements, counterspeech is not nearly as effective in defending against deepfakes.[80] First, the sheer magnitude of possible things that deepfakes can portray an

[75] Id. at 377 (Brandeis, J., concurring).
[76] United States v. Alvarez, 567 U.S. 709, 729 (2012).
[77] Cass R. Sunstein, Falsehoods and the First Amendment, 33 **Harv. J.L. & Tech**. 387, 421 (2020).
[78] Other methods to disprove deepfakes, such as those developed at Berkeley, have been acknowledged to be unrealistic solutions on a large scale. See Larsen, supra note 29.
[79] These differences suggest that there is no less restrictive means for combatting deepfakes; therefore, civil or criminal penalties are necessary. As discussed infra, protecting the integrity of our elections also satisfies the "compelling interest" element of strict scrutiny. It is beyond the scope of this Note to suggest specific language to ensure that these statutes are sufficiently "narrowly tailored" to satisfy strict scrutiny, but this Note argues that a foreseeable harm standard will be more likely to satisfy this requirement than the approaches adopted by current deepfake laws.
[80] Matthew Kugler & Carly Pace, Deepfake Privacy: Attitudes & Regulation, 116 **Nw. Univ. L. Rev**. 611, 669-70 (2021).

individual saying or doing make it difficult to adequately rebut each misrepresentation.[81] Second, people are more likely to assume a deepfake depicts the truth than other false statements.[82] Just as the saying goes: seeing is believing. Moreover, even when confronted with a deepfake's inconsistencies, our brains resist entirely discounting its reality.[83] Both feasibility and psychological reluctance to question our own perceptions thus raise serious obstacles to effective counterspeech in the deepfake context.

Additionally, the Court raised the role of public backlash in countering false speech: Alvarez was ridiculed for lying, and other false claimants would be too.[84] The Court says that, in and of itself, this public condemnation would serve to reduce the deceptive impact of misinformation. The anonymity of deepfake creators and subsequent sharers, however, is well-documented.[85] Alvarez was spreading false claims about himself: his speech was visibly connected with him.[86] The creator of a deepfake, disguised by a false name or no name at all, hidden behind layers of sophisticated protection from identification, and empowered by subsequent sharers that need not attach the creator's name to their own posts, will not face the same disrepute.

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[81] Shannon Reid, The Deepfake Dilemma: Reconciling Privacy and First Amendment Protections, 23 **U. Pa. J. Const. L.** 209, 219 (2021).
[82] Nils C. Köbis et al., Fooled Twice: People Cannot Detect Deepfakes But They Think They Can, **iScience** (2021) (first citing Ilana B. Witten & Eric I. Knudsen, Why Seeing Is Believing: Merging Auditory and Visual Worlds, **Neuron** (2005); then citing Doris A. Graber, Seeing Is Remembering: How Visuals Contribute to Learning From Television News, 40 **J. Comm**. 134 (1990)).
[83] Nils Köbis et al., The Psychology of Deepfakes, **Psych. Today** (2021); see Cass Sunstein, Can the Government Regulate Deepfakes?, **Wall Street** J. (2021).
[84] United States v. Alvarez, 567 U.S. 709, 726-27 (2012).
[85] Delfino, supra note 3, at 901.
[86] Alvarez, 567 U.S. at 727.

b. "Other Legally Cognizable Harm"

In Alvarez, the government argued that there is no First Amendment protection for false statements.[87] The Court rebutted this argument and stated that dishonesty alone could not be condemned: liability for false statements requires the presence of "defamation, fraud, or some other legally cognizable harm associated with a false statement."[88] Deepfakes used in furtherance of an election interference scheme are just that. Therefore, they cannot be considered "mere falsity." At the very least, they are falsity accompanied by reputational damage to the candidate, which falls squarely within the examples that the Court provided.[89]

c. Policing Truth & Chilling True Statements

An oft-cited concern with any limitation on First Amendment protections is that the government is being placed in the role of "arbiter of truth."[90] This consideration also played heavily into the Court's decision in Rickert v. Washington, in which the Court did not extend liability to a political candidate that made false statements about her competitor.[91] The Court was hesitant to "assume[] the government is capable of correctly and consistently negotiating the thin

[87] See id. at 719.
[88] Id.
[89] Jessica Ice, Defamatory Political Deepfakes and the First Amendment, 70 **Case W. Res. L. Rev**. 417, 419, 434 (2019) (highlighting both the reputational damage to a candidate and their campaign and the "societal damages caused by the video if it is allowed to persist in the public sphere"). Others have argued that deepfakes fall into the existing misappropriation of likeness or invasion of privacy torts, see Zahra Takhshid, Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort, 68 **Buff. L. Rev.** 139, 150 (2020), or that deepfakes are not speech at all, see generally Marc Jonathan Blitz, Deepfakes and Other Non-Testimonial Falsehoods: When Is Belief Manipulation (Not) First Amendment Speech?, 23 **Yale J.L. & Tech**. 160 (2020). It is beyond the scope of this Note to analyze these arguments in their entirety, but their success is unlikely. Kavyasri Nagumotu, Deepfakes Are Taking Over Social Media: Can the Law Keep Up?, **IDEA: L. Rev. Franklin Pierce Ctr. for Intell. Prop.** 128 (2022).
[90] Alvarez, 567 U.S. at 752 (Alito, J., dissenting).
[91] Rickert v. State of Washington, Public Disclosure Comm'n, 168 P.3d 826 (2007)

line between fact and opinion in political speech."[92] If the government could censor statements that it determined to be false, there is the potential for partisan manipulation of what are understood to be "facts."[93] Greater restrictions on deepfakes, however, do not implicate this concern. By definition, deepfakes present inaccurate information, and therefore they are not factual.[94] To be clear, as discussed above, detecting deepfakes is at times exceedingly difficult in practice. But when a video is determined to be a deepfake, it is beyond debate that the content is inaccurate.

For the same reason, there is no concern that true statements will be chilled by statutes aimed at curbing deepfakes,[95] which was at issue in New York Times v. Sullivan, the landmark case establishing "actual malice" as a requisite element of defamation claims brought by public figures.[96] The New York Times published an advertisement funded by civil rights groups that contained several inaccuracies about interactions between protesters and the Montgomery, Alabama police force.[97] Montgomery's Commissioner of Public Affairs, who was charged with overseeing the police force, brought a libel claim against the New York Times due to the advertisement's impact on his reputation.[98] Fearing that such claims would impede the ability of

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[92] Id. at 829.
[93] See Katrina Geddes, Occularcentrism and Deepfakes: Should Seeing Be Believing?, 31 **Fordham Intell. Prop. Media & Ent.** L.J. 1042, 1076 for other noted concerns. See also Sunstein, supra note 77, at 398 (noting that the government could also make genuine mistakes about what is true and what is false). But see Langa, supra note 20, at 767-68.
[94] Ice, supra note 89, at 439.
[95] It could be argued that the fear of inadvertently sharing a deepfake would chill subsequent sharers from reposting online content; however, as discussed infra, a lack of proof of reckless or intentional conduct in sharing a deepfake -- such as altering or removing a disclaimer -- would protect against inappropriately attaching liability.
[96] 376 U.S. 254 (1964). For an argument that New York Times v. Sullivan's guidelines are no longer serviceable, see Sunstein, supra note 77, at 406-12.
[97] New York Times v. Sullivan, 376 U.S. at 256-57.
[98] Id. at 256.

press outlets and citizens alike to freely debate public officials, the Court made clear that First Amendment protections extend to "erroneous statements honestly made."[99] Therefore, the Court's reasoning expressed the importance of leaving "breathing space" for free speech in general, and political speech specifically.[100] Deepfakes, though, are decidedly not "honestly made." Assigning liability to harmful deepfakes does not carry the same danger of discouraging innocent speech.

d. Satisfying Scrutiny

Lastly, the plurality advocated for an "exacting scrutiny" approach in Alvarez, requiring a compelling government interest to restrict speech.[101] Though the government's interest in protecting the "value and meaning" of the Medal of Honor was compelling,[102] the Stolen Valor Act was deemed unnecessary to serve this interest because there was no evidence that "the public's general perception of military awards is diluted by false claims" of attainment.[103] The other impacts of Alvarez's and similar false claims -- such as offending actual recipients of the Medal of Honor -- could not justify the speech restriction. The same cannot be said for the impacts at stake here. First, the public perception of a candidate can be, and has been, changed by the spread of deepfakes.[104] As compared to the "general perception of military awards," then, the need for legislation to remedy defamatory impacts on a candidate is much more tangible. Second, there is the omnipresent concern that the outcome of an election will be irreparably altered by the spread of deepfakes, and Justice Breyer's concurrence in Alvarez recognized that

[99] Id. at 278.
[100] Id. at 298.
[101] United States v. Alvarez, 567 U.S. 709, 715 (2012). Justice Breyer argued instead that intermediate scrutiny should be applied. Id. at 725, 730 (Breyer, J., concurring).
[102] Id. at 726.
[103] Id.
[104] Langa, supra note 20, at 767.

deepfakes specifically relating to political campaigns are "more likely to make a behavioral difference" among viewers.[105] Thus, the necessity for intervention to protect the government's interest is much clearer here than in Alvarez.

As to the interest itself, some have asserted that there exists a free-standing compelling interest in ensuring free and fair elections.[106] Yet, the extent to which this holds true when applied to restrict political speech is less clear, given the hesitance to limit important First Amendment rights. For example, in Citizens United v. FEC, the Court considered a restriction on corporate-funded electioneering communications in the run-up to an election as applied to a documentary critiquing then-presidential candidate Hillary Clinton.[107] Though upholding the integrity of the political process was central to the legislation at issue and to previous campaign finance cases,[108] the Court in Citizens United did not recognize this broad interest in protecting elections. Rather, the Court made clear that "laws that burden political speech" should rarely pass constitutional muster and only within a narrow framework, explaining that the government could not censor on the basis of speaker nor viewpoint, and that the government could only restrict speech if it would interfere with government entities -- such as public schools and correctional facilities -- functioning properly.[109] The documentary in question could not be construed to have such an effect and, therefore, merited First Amendment protection.[110] Similar

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[105] Alvarez, 567 U.S. at 738 (Breyer, J., concurring).
[106] For discussion of this compelling interest in the context of gerrymandering, see Daunt v. Benson, 956 F.3d 396, 426 (6th Cir. 2020) (Readler, J., concurring) (quoting Brief of Amicus Curiae Brennan Center for Justice, at 24). See also Ice, supra note 89, at 439; Langa, supra note 20, at 781.
[107] 558 U.S. 310, 319 (2010).
[108] Frank J. Favia Jr., Enforcing the Goals of the Bipartisan Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections, 2006 **U. Ill. L. Rev.** 1081, 1082; McConnell v. FEC, 540 U.S. 93, 137 (2003).
[109] Citizens United, 558 U.S. at 341.
[110] Id.

arguments will no doubt be made regarding deepfakes due to the ostensible lack of concrete interference with a specific government function. That being said, the aforementioned potential for deepfakes to be used to extort politicians, gain access to confidential information, and infuse misinformation into policy debates all present real threats to government functions.[111]

The Court's other reasons for protecting the speech in Citizens United may actually counsel in favor of deepfake restrictions' constitutionality. First, the Court cites Buckley v. Valeo for the notion that "the ability of the citizenry to make informed choices" is essential to the operation of our democratic republic.[112] Corporations, the Court says, may be uniquely well-suited to bring about important information and aid voters' decision-making ability.[113] Unlike the speech in these cases, which raised concerns about the power of wealth in elections but was not inherently unreliable, deepfakes expressly undermine that ability. Second, the Court in Citizens United stated that "voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[114] If unconditional, this would appear to cut against any form of political speech limitation. But this right is not unconditional. For example, all fifty states have laws restricting electioneering activities near polling places.[115] When a campaign official challenged Tennessee's law that prohibits electioneering within 100 feet of a polling place, the Court in Burson v. Freeman upheld the law and found that the state had a compelling interest in "protecting voters from confusion and undue influence."[116] Evidently, certain sources harm,

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[111] See supra note 25 & 26 and accompanying text.
[112] Citizens United, 558 U.S. at 339 (quoting Buckley v. Valeo, 424 U.S. 1, 14-15 (1976)).
[113] Id. at 364.
[114] Id. at 341.
[115] Kansas Legislative Research Department, Electioneering Distances in All 50 States (Oct. 28, 2022), http://www.kslegresearch.org/KLRD-web/Publications/ElectionsEthics/electioneering-distances_2022-update.pdf.
[116] 504 U.S. 191, 199 (1992).

rather than help, voters. The danger of deepfakes is not only more similar to the danger posed by the electioneering in Burson than in Citizens United, but it is perhaps an even clearer example of "confusion and undue influence" than polling place campaigning, which is nationally condemned.

ii. Looming Issues

a. Mens Rea

One constitutional obstacle that still may plague deepfake laws is the mens rea requirement. The Court has repeatedly highlighted that cases in which false speech was condemned involved false statements made knowingly or with reckless disregard for the statement's veracity.[117] As stated above, the creator of a deepfake undoubtedly makes a false statement "knowingly."[118] It is less clear what the mens rea of a subsequent sharer is. If a statute holds liable everyone that shares a deepfake, it may ensnare the "careless" speaker about whom the Court was worried.

b. Context-Blind Restrictions

Another concern raised in Alvarez, which is still relevant in the context of deepfakes, was that the Stolen Valor Act applied to "false statement[s] made at any time, in any place, to any person," reaching false speech "in almost limitless times and settings."[119] Preliminarily, it is worth distinguishing the concerns at issue in Alvarez from the concerns animating "time, place,

[117] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (pertaining to alleged defamatory depictions of minister Jerry Falwell engaging in incestuous behavior with his mother in a nationally-circulated magazine); United States v. Alvarez, 567 U.S. 709, 719-20 (2012).
[118] Ice, supra note 89, at 434.
[119] Alvarez, 567 U.S. at 722-23.

and manner restrictions" for speech in public fora.[120] In Ward v. Rock Against Racism, Justice Kennedy -- again writing for the Court -- discussed requirements for the latter: the government may limit speech in a specific setting if the limitation 1) is content-neutral, 2) is narrowly tailored to serve a significant government purpose, and 3) leaves open alternative ways to communicate the speaker's message.[121] If speech is to be prohibited in a public forum in a specific context, the government must be justified in selecting this context for prohibition and the regulation must not be a tool for selective enforcement. Here, the Court is expressing a different concern: that the statute's "sweeping" breadth and indifference to the context statements were made in was in tension with First Amendment rights.[122] Thus, restrictions must be limited to the situations in which the speech is accompanied by a concrete harm.[123]

Specifically, the Court noted that the Stolen Valor Act would treat equally statements made in a public meeting and "whispered conversations within a home," suppressing them both alike.[124] Some of the current attempts at deepfake legislation have attempted to comply with this constitutional prerequisite by only imposing liability during certain time periods, such as 30 days before a midterm election or 60 days before a general election.[125] This strategy does tread into the realm of time, place, and manner restrictions discussed above, opening up the need to comply with the requirements for such restrictions. It also resembles previously-invalidated provisions of statutes limiting political speech, like the Bipartisan Campaign Reform Act, which prohibited

[120] Though seemingly easy to distinguish, the differences between the two threads of concern may be relevant if large social media platforms are considered public spaces, as heralded in the Fifth Circuit opinion discussed supra.
[121] 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Nonviolence, 468 U.S. 288, (1984)).
[122] Alvarez, 567 U.S. at 722.
[123] Id. at 723.
[124] Alvarez, 567 U.S. at 722.
[125] See Wilkerson, supra note 4, at 424 (2021).

corporate "electioneering communications" in the run-up to elections.[126] Rigid temporal cut-offs like this also draw unnatural distinctions between punishable and non-punishable deepfakes: does a deepfake posted 61 days before an election automatically pose significantly greater harm than a deepfake posted one day later, regardless of their other features?

c. Discriminatory Enforcement

Lastly, an ongoing fear that accompanies any attempt to limit politically-oriented speech is discriminatory enforcement.[127] One could argue that, because drawing the cut-off of what is "foreseeable enough" to be held liable is unavoidably subjective to a degree, prosecutors will be able to choose whom to pursue charges against on a strictly partisan basis, allowing for discriminatory enforcement of deepfake laws based on the powers that be. Such prosecutorial misconduct may be confined by greater oversight and sanctions.[128] Additionally, statutes assessing civil liability will avoid this problem by creating a private right of action allowing victims of deepfakes -- either a person whose reputation is damaged by a deepfake or a person who was impacted by a deepfake's impact on an election -- to seek justice for themselves.[129] Of

[126] Bipartisan Campaign Reform Act of 2002; Citizens United v. FEC, 558 U.S. 310 (2010). It has been argued that the fundamental differences between corporate-funded political speech and deepfakes render this similarity irrelevant. See Anna Pesetski, Deepfakes: A New Content Category for a Digital Age, 29 **Wm. & Mary Bill Rts.** J. 503, 518 (2020). However, this does not go far to suggest that the temporal limitations serve to remedy the Court's fears unless deepfake laws are accepted more broadly as constitutional.

[127] Alvarez, 567 U.S. at 734 (Breyer, J., concurring).

[128] See Deputy Att'y Gen. Rod J. Rosenstein Delivers a Constitution Day Address, Dep't of Just. (Sept. 18, 2017); Samuel J. Levine, Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis, 14 **Ohio St. J. of Crim. L.** 143 (2016).

[129] For a discussion of the implications of a private right of action on addressing deepfakes, see generally Eric Kocsis, Deepfakes, Shallowfakes, and the Need for a Private Right of Action, 126 **Dick. L. Rev**. 621 (2022).

course, these statutes may bring with them other complications, such as frivolous lawsuits against satirists and the like in order to curb messages that the claimants disagree with.[130]

There may also be concerns of partisan bias amongst judges and juries hearing these cases: perhaps the political persuasion of the defendant will impact whether they are determined to be liable.[131] Of course, this is not the first example of cases that could implicate partisan bias:[132] to a certain extent, bias may be considered inevitable.[133] Some have argued that the current safeguards of jury selection and appellate review are, if not satisfactory, the closest we can come to a solution.[134] Additional procedural measures to protect against partisan bias amongst juries could turn to evidence submission, such as jury instructions to address bias[135] and excluding evidence whose probative value to determining foreseeable harm is substantially outweighed by its risk of prejudice to the defendant on the basis of their political persuasion.[136] Though it is likely implausible to entirely eliminate bias in politically-charged trials, these safeguards could allow harmful deepfakes to be addressed while minimizing the effect of partisan bias as much as possible to produce more neutral verdicts.

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[130] Cf. Langa, supra note 20, at 798.
[131] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)
[132] See James P. Brady, Fair and Impartial Railroad: The Jury, the Media, and Political Trials, **Journal of Criminal Justice** (1983).
[133] See Shamena Anwar et al., Politics in the Courtroom: Political Ideology and Jury Decision Making, 17 Journal of the European Economic Association 834 (2019) (describing the effect of partisan bias in Swedish juries, which are composed of some appointed professionals and some selected "lay jurors").
[134] See Brady, supra note 132; Cassandra Burke Robertson, Judicial Impartiality in a Partisan Era, 70 **Fla L. Rev**. 739 (2018).
[135] See Anona Su, A Proposal to Properly Address Implicit Bias in the Jury, 31 **Hastings Women's** L.J. 79, 98-99 (2020).
[136] See generally David Sonenshein & Charles Fitzpatrick, The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence, 32 **Rev. Litig**. 1 (2013) (proposing court-appointed neutral experts akin to civil law jurisdictions or cooperation between competing experts).

B. Shared Features of Existing Laws and Their Blind Spots

i. Disclaimers

One common point of discussion for deepfake liability is the effect of disclaimers. The presence of a disclaimer has been said to make deception of a reasonable viewer improbable. Therefore, under a reasonable viewer standard, including a disclaimer that announces that there have been modifications to the video frees the creator of liability.[137] Additionally, several states' laws explicitly waive liability for publishers that attach a disclaimer to a deepfake.[138]

The inclusion of a disclaimer, however, does not preclude reputational harm to the candidate or impacts on an election. As acknowledged above, certain viewers will still internalize and amplify the message a deepfake conveys, even if its falsity is made apparent.[139] Thus, a disclaimer alone is not enough to render a deepfake harmless when other features of its publication operate to increase its danger. Additionally, many forms of disclaimers, such as a simple text caption accompanying a posted deepfake, are easily removed.[140] Therefore, though the original post may declare its inaccuracy, subsequent posters -- hundreds or even thousands of which may reach a drastically larger audience than the single original post[141] -- may not. For that reason, many statutes require stricter forms of disclaimer like digital watermarks, seen as both more successful in preventing deception and more difficult to remove.[142] Yet, such requirements do not solve all problems.

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[137] Ice, supra note 89, at 434.
[138] See Part I.B supra.
[139] Harwell, supra note 5.
[140] Douglas Harris, Deepfakes: False Pornography Is Here and the Law Cannot Protect You, 17 **Duke L. & Tech. Rev**. 99, 117 (2018-2019).
[141] See infra note 149 and accompanying text.
[142] Langa, supra note 20, at 789.

To start, these disclaimers may still easily be removed by subsequent sharers.[143] Further, by giving viewers the impression that any content without a disclaimer is legitimate, there may actually be a negative impact: deepfakes that are not accompanied by a disclaimer will be trusted even more.[144] This may make it necessary for the platforms upon which deepfakes are published to remove any deepfake that isn't accompanied by the necessary disclaimer.[145] But this would seemingly require the platforms to carry out the determination of a video's accuracy. At the very least, this mandate would require extensive monitoring and take time to administer.[146] More troublingly, the platforms may not be able to determine the accuracy of each and every video, due to the aforementioned technological limitations to policing deepfakes.[147]

Lastly, by adding a disclaimer, a deepfake creator can essentially free themselves of liability, despite the negative effects their content is still likely to have. Even the expansive grasp of the proposed House bill, which attaches liability to those that "alter" a disclaimer and therefore reaches culpable subsequent sharers, has its blind spots. By not amending or removing the disclaimer, the subsequent sharer can satisfy their burden to avoid liability.[148] Yet, even when the deepfake is shared with the disclaimer, there is still real damage, since it has been shown that

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[143] Devin Coldeway, DEEPFAKES Accountability Act Would Impose Unenforceable Rules -- But It's a Start (Jun. 13, 2019), https://techcrunch.com/2019/06/13/deepfakes-accountability-act-would-impose-unenforceable-rules-but-its-a-start/. Additionally, people that truly seek to deceive likely will not add the disclaimer. Ellen P. Goodman, Digital Fidelity and Friction, 21 **Nev**. L.J. 623, 636 (2021).

[144] Langa, supra note 20, at 789; cf. Köbis et al., supra note 82 (finding that people's overconfidence and tendency towards authenticity lead them to guess that nearly 70% of videos were authentic even after being told that only 50% were authentic).

[145] Danielle S. Van Lier, The People v. Deepfakes, 43 L.A. L**aw**. 16, 20 (2020).

[146] Given the aforementioned Fifth Circuit decision relating to platforms' ability to remove content, there is also a question of whether platforms would be allowed to take on this responsibility.

[147] See Vaccari, supra note 28.

[148] Langa, supra note 20, at 789; Kocsis, supra note 129, at 643.

people with preconceived beliefs that are affirmed by the deepfake will continue to hold the deepfake out as true even when they know it has been discredited.[149]

ii. Subsequent Sharers

Another policy consideration is whether to limit liability to the original publisher of a deepfake or to extend liability to subsequent sharers. As previously mentioned, the House's proposed bill encapsulates those that publish deepfakes without the necessary disclaimers and those that alter a deepfake to "remove or meaningfully obscure" the disclaimer.[150] This is in stark contrast to the state statutes currently in place, which specify that only the creator of a deepfake can be held liable.[151]

The case for extending liability is clear. Subsequent sharers can have a significantly larger deleterious impact than the original poster, spreading a deepfake to countless people around the world.[152] Furthermore, when combined with other ill-advised elements, these statutes unintentionally allow for worrisome, liability-less situations. Some statutes waive liability if a deepfake is accompanied by a disclaimer. If liability is limited to initial posters, subsequent sharers are left free of legal consequence for posting a deepfake without one. As a result, if the original creator attaches a disclaimer but subsequent sharers do not include it, the victim of the deepfake would have no recourse -- even though the damage caused could still be expansive.[153]

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[149] See supra note 19.
[150] See Part I.B supra.
[151] Id.
[152] See Sapna Maheshwari, How Fake News Goes Viral: A Case Study, **New York Times** (2016); Nagumotu, supra note 89; Herbert B. Dixon Jr., Deepfakes: More Frightening Than Photoshop on Steroids, 58 J**udges** J. 35 (2019); Viktoriia Formaniuk et al., Protection of Personal Non-Property Rights in the Field of Information Communications: A Comparative Approach, 13 J. **Pol**. & L. 226, 230 (2020).
[153] Harris, supra note 140, at 117. Though the scope of this Note is limited to deepfakes affecting election interference schemes, the problem inherent to this intersection is also manifest in the other common context that deepfake legislation has tackled: revenge porn.

Conversely, one benefit of limiting liability is to avoid the complication of trying to rein in culpable subsequent sharers without chilling innocent sharers' speech. Another is to avoid the exceedingly arduous task of pursuing all of these sharers, an additional burden on top of the existing difficulty of tracking deepfake publishers.[154] Though the former may be addressed by this Note's proposed approach, the latter is likely to remain an issue given the ever-improving strategies to avoid detection and the lack of equivalent countervailing methods.[155]

iii. Reasonable Viewer

Last, baked into the definition of a deepfake in many statutes is a reasonable viewer standard:[156] would the modified content in question deceive a "reasonable" person? If not, then the publisher will not be held liable. But there is good reason to think that such a standard has a significant blind spot, especially in the context of politically-oriented deepfakes.[157]

Preliminarily, this normative approach ignores the fact that any change in behavior at the ballot box is a harm worth curtailing.[158] Why should it matter whether a viewer is not considered a "reasonable person" if they are deceived into changing their own vote or convincing others to do so? After all, their votes count just the same.

Further, politically-oriented deepfakes may be intentionally aimed at unreasonable viewers. Studies have shown that online communities based around particular political ideologies insulate their members from information that contradicts their own preconceived notions;

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[154] Langa, supra note 20, at 793.
[155] Sara Ashley O'Brien, Deepfakes are Coming. Is Big Tech Ready?, CNN (Aug. 8, 2018).
[156] See Part I supra; Lauren Renaud, Will You Believe It When You See It? How and Why the Press Should Prepare for Deepfakes, 4 **Geo. L. Tech. Rev**. 241, 250 (2019).
[157] It is also unavoidable that what is considered "reasonable" for a viewer will evolve over time with changing technology and increased awareness of that technology. Ice, supra note 89, at 437.
[158] Id. at 439; Langa, supra note 20, at 781.

instead, the members are fed more information that confirms these notions.[159] Thus, "intentionally false information . . . is often accepted and circulated."[160] These communities' conception of what is "true" is skewed towards the common beliefs of the group. Therefore, what might not deceive a "reasonable" audience may readily permeate such a community. Scholars have documented the potential for deepfakes to be harnessed for purposes ranging from gaining support for violent extremist groups to enforcing anti-immigrant sentiments.[161]

To this point, it is hopefully clear that current deepfake laws are far from ideal. These laws go both too far, to the point of chilling free speech, and not far enough, failing to address some of the most harmful deepfakes. It is not the goal of this Note, however, to advocate for returning to a pre-deepfake legislation landscape. Rather, this discussion is meant to highlight the weaknesses of current laws in order to foster reforms to strengthen their enforcement capabilities and bring them onto more solid constitutional footing. Part III proposes one such reform: a "foreseeable harm" standard.

III. The Benefits of a Foreseeable Harm Approach

In order to address many of the looming constitutional and policy concerns surrounding deepfake laws, future legislation should incorporate a "foreseeable harm" standard of liability, measured via a totality of the circumstances test.[162] This approach allows for the consideration of

[159] Cédric Batailler et al., A Signal Detection Approach to Understanding the Identification of Fake News, **Persps. on Psych. Sci.** (2022); Jared Schroeder, Fixing False Truths: Rethinking Truth Assumptions and Free-Expression Rationales in the Networked Era, 29 **Wm. & Mary Bill Rts**. 1097, 1099-1100 (2021) (citing Ana Lucia Schmidt et al., Polarization of the Vaccination Debate on Facebook, 36 **Vaccine** 3606, 3610 (2018)).
[160] Schroeder, supra note 159, at 1099-1100.
[161] Europol, Facing Reality? Law Enforcement and the Challenge of Deepfakes (2022); Michael Hameleers et al., You Won't Believe What They Just Said! The Effect of Political Deepfakes Embedded as Vox Populi on Social Media, **Soc. Media + Soc'y** (Sept. 2022).
[162] Several lingual formulations of this standard exist. Cf. Part III(b)(ii) infra. Future legislation should, as a starting point, adopt some form of the following: "A defendant will be liable for any

several factors that may contribute to a deepfake's harmful effects, rather than relying on poorly-fitting binary rules. Among the factors that may be considered are: the presence of a disclaimer; the type of disclaimer included; where the deepfake is published, weighing the difference between a text message and a social media post; who the deepfake is sent to, considering specifically susceptible populations; when the deepfake is published; who the deepfake is meant to depict -- directly or indirectly -- and what it depicts about that person; the quality of the deepfake; and, who posts the deepfake, considering that a newscaster or politician will have more credibility than a blogger. A foreseeable harm approach would provide more sufficient protection for all of the victims of deepfakes, while also avoiding impermissible infringements of speakers' First Amendment rights.[163]

A. Benefits of Implementing a Foreseeable Harm Approach to Deepfake Regulation

i. Reasonable Viewer

Perhaps most importantly, a foreseeable harm standard will not fall victim to the "blind spot" pertaining to the reasonable viewer standard that current attempts at deepfake legislation has adopted. As previously described, not only is there a possibility that "unreasonable" audiences will still be deceived by even crude deepfakes,[164] but politically-oriented deepfakes are likely targeted at these very audiences.[165] Therefore, attaching liability only when a deepfake

harm that, at the time of the defendant's acts which constitute publication, would have been a foreseeable result to a reasonable person in the defendant's position."

[163] Cf. Langa, supra note 20, at 781.

[164] Harwell, supra note 5 (quoting Becca Lewis) ("When [the truth of the alteration] comes to light, people just don't care…. They say 'it could have been true' or 'nonetheless, it reflects who the person really is.'").

[165] Part II supra. See also Edward Lee, Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance, 70 **Am. U.L. Rev**. 913, 1017 (2021) (demonstrating how politically-oriented subreddits allow discriminatory content moderation, likely leading to bias).

would deceive a "reasonable" viewer ignores the fact that harm will still follow from the dissemination of a deepfake that may not pass this muster.[166]

Conversely, a foreseeable harm standard will capture a publisher of a deepfake that intentionally targets susceptible viewers: clearly, they would predict the effect that their content would have.[167] Furthermore, as scholars have noted, these publishers may not have any expectation of convincing someone that does not already believe the message of the deepfake; rather, the goal may be to simply "reinforce existing beliefs and get people more entrenched in those beliefs."[168] Thus, the publisher need not deceive a reasonable viewer in order to achieve their intended outcome: "the falseness barely matters… people who believe the message already aren't looking for a counternarrative: They just want confirmation that they were right all along."[169] This is further supported by studies showing that "familiarity" increases believability.[170] By seeking out subpopulations devoted to a certain political persuasion that are already inundated with messaging similar to that conveyed in the deepfake, the publisher is more likely to find a susceptible audience. An objective of reinforcing messaging to certain populations would still serve to make this harm, and any secondary harm resulting from it,[171] worth remedying. Thus, a foreseeable harm standard could still attach liability.

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[166] Anne Gieseke, "The New Weapon of Choice": Law's Current Inability to Properly Address Deepfake Pornography, 73 **Vand. L. Rev**. 1479, 1485 (2020) (showing that by putting deepfakes in a group like the "r/deepfake" group, they will be spread elsewhere and may be more likely to deceive viewers in that new context).

[167] For example, after posting a deepfake that depicted President Obama shaking hands with a foreign leader, which was reposted by several thousand others, Congressman Gosar's response was that it was the fault of the "dim witted" people that believed it, and that "[n]o one said this wasn't photoshopped." Harwell, supra note 5.

[168] Harwell, supra note 5, (quoting Darren Linvill).

[169] Harwell, supra note 5.

[170] Vaccari & Chadwick, supra note 28, at 2.

[171] Gieseke, supra note 166, at 1485 (describing how deepfakes spread from Reddit to elsewhere).

ii. Context-Blind Restrictions

A foreseeable harm standard can also avoid the danger of prohibiting a certain type of speech by any person, at any time, in any place. Rather than categorical, context-blind rules that the Court warned against in Alvarez,[172] a foreseeable harm standard would take into account each of these factors among others.

For example, "where" a deepfake is posted would affect how foreseeable the downstream harm to a candidate's reputation or to a voter's behavior in an election would be. A deepfake texted to a friend, the equivalent of the Court's "whispered [] within a home," would have significantly less foreseeable harm than one posted to an online extremist political group.[173]

Likewise, "who" posts a deepfake would clearly impact the foreseeable harm given the size of a person's audience and their credibility.[174] We have already seen how highly visible people sharing deepfakes can increase their impact.[175]

"When" a deepfake is posted could also be taken into account to determine its potential deceptive impact. However, a totality test avoids adopting a hardline rule, like those employed in the BCRA and some existing deepfake laws -- in which any deepfake posted within the 60-day time period before an election falls within the ambit of the statute, and any deepfake posted outside of that window is beyond the statute's grasp.[176] While it is true that the closer to an election the deepfakes is posted, the more weight it may carry in the balancing of

[172] See supra note 124 and accompanying text.
[173] Dhruva Krishna, Deepfakes, Online Platforms, and a Novel Proposal for Transparency, Collaboration and Education, 27 **Rich. J.L. & Tech**. 1, 34. And the "where" can extend to specific communities within a single platform.
[174] Barrett Jr., supra note 28, at 635.
[175] Harwell, supra note 5.
[176] Part I supra.

circumstances,[177] the timing would not be dispositive. Instead, the point at which it is posted can simply be weighed amongst other factors. For example, a deepfake posted 61 days before an election, but in many other ways particularly deceptive and harmful may still be acted on. And a deepfake posted within the 60-day time period, but otherwise not particularly deceptive or harmful, would not be targeted.

In fact, the confluence of Justice Kennedy's concern for context-blind restrictions and Justice Breyer's recognition of the potential for deepfakes to impact voter behavior[178] illustrates why the current patchwork approaches are trying to fill a circular hole with a square peg. The current laws are primarily aimed at determining how convincing the deepfake itself is. However, the more important question to ask is: whether the person posting the deepfake acted in a way that was likely to harm the candidate's reputation or impact an election. Take, for example, the above-described deepfake of President Nixon that was created at MIT. Using the best available technology, they created a deepfake that could deceive a reasonable viewer more readily than most any other deepfake.[179] Yet, MIT's efforts were part of a project to educate the community on the extent of new AI capabilities: the way in which this deepfake was distributed, therefore, would be less likely to have a harmful impact.[180]

That does not rule out the possibility of other people sharing the synthetic video in a different context and potentially deceiving audiences. Though this could create liability for those sharers, it would not retroactively create liability for MIT. To be clear, this does not mean that

[177] And even this proposition is likely not as black and white as one would think, at least in the context of changing voter behavior. A deepfake posted hours or even days before an election may in some instances have less damage than those posted further in advance if its false message didn't have time to reach a mass audience.
[178] Supra note 105 and accompanying text.
[179] Thus, this standard is both over-inclusive in some instances and under-inclusive in others.
[180] This is similarly relevant to satirical programs.

any deepfake posted that, in and of itself, is unlikely to deceive can never create liability. The important consideration will be: at the time the deepfake was posted, was it foreseeable that it would be used for nefarious purposes down the line?

iii. Mens Rea

Deepfake laws must be cognizant not to impose liability on the "careless" speaker. Again, the intent of an individual that creates a deepfake is clear: certainly, after synthetically modifying an image or video, the creator did not think that the content they shared was accurate.[181] If liability can be extended to subsequent sharers that post a deepfake that would deceive a reasonable viewer, however, there is no guarantee that this individual had such a culpable mens rea.[182] A foreseeable harm standard will allow for the specific circumstances in which a deepfake was shared to be considered. For example, a "careless" speaker that does not realize they are sharing a deepfake clearly could not foresee that this post would cause harm.[183] Meanwhile, someone who removes a disclaimer before sharing would be more likely to foresee a deceptive effect.

iv. Subsequent Sharers

Another, related, consideration that has presented policy concerns is the decision to hold subsequent sharers liable or to limit liability to the original publisher of a deepfake.[184] A foreseeable harm, totality of the circumstances test would not have to make this categorical call.

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[181] Ice, supra note 89, at 439.
[182] Part II, supra.
[183] Thus, functionally, the "actual malice" requirement chosen by some legislatures will still be at play. The intentional or reckless behavior of any given sharer may be considered, along with the totality of their conduct, in order to determine liability. Matthew Bodi, The First Amendment Implications of Regulating Political Deepfakes, 47 **Rutgers Comput. & Tech**. L.J. 143, 162 (2021).
[184] Compare, e.g., **Tex. Elec. Code** § 255.004 with H.R. 2395 DEEP FAKES Accountability Act, 117th Congress (2021).

Rather, it could take into account the knowledge of the subsequent sharer when deciding upon the foreseeability of downstream deception or harm. The less that can be shown to conclude that a subsequent sharer had knowledge of the content's falsity, the less foreseeable harm their post could be said to have. This allows for the flexibility to pursue legal action against subsequent sharers that are particularly culpable -- such as those that intentionally remove watermarks, publish deepfakes to susceptible populations, or take other steps to increase the likelihood of harm -- and to avoid the situation described above in which a victim is denied recourse despite significant harm. But it does so without chilling innocent speech by the "careless" sharer. Even malicious sharers that do not engage in the same degree of culpable behaviors can be spared liability.

Of course, there will still be problems of proof in demonstrating what a sharer knew or what actions they took -- e.g., did they see the deepfake with a disclaimer and remove it?[185] However, rather than viewing this as a bug, it can be seen as a check on chilling speech. As explained above, if there isn't proof of the sharer's culpability, they will not be held liable. But if that proof exists and is significant enough in the totality test to merit liability, they will not be able to wipe their hands clean of their wrongdoing.

v. Disclaimers

A foreseeable harm approach would also allow for a more flexible approach to disclaimers by considering the type of disclaimer attached.[186] For example, a text caption

[185] Ice, supra note 89, at 433.

[186] Another criticism of a binary system of liability based on the presence or absence of a disclaimer is that requiring a disclaimer is a form of compelled speech. Cf. Quentin J. Ullrich, Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It, 55 **Colum. J.L. & Soc. Probs**. 1, 30 (2021) (arguing that this criticism is misplaced if the requirement leaves exceptions for types of speech that are less likely to be harmful). The flexibility of a foreseeable harm standard allows for a publisher's inclusion of a disclaimer to

accompanying a deepfake is less effective in demonstrating an image's falsity to a viewer and would do little to prevent down-the-line removal and, therefore, potential harm.[187] Meanwhile, a digital watermark would likely limit deception even after subsequent sharing and is much more likely to cause a viewer to heed the manipulated nature of the content. The type of disclaimer you choose to attach, and if you choose to attach a disclaimer at all, would change how foreseeable a threat of deception and harm would be. Like the above-described factors, rather than a binary distinction between the presence or absence of a disclaimer or between a textual or digital watermark disclaimer, a foreseeable harm standard will consider this as only one aspect of the totality of the circumstances.

Even identical disclaimers will not always have an equivalent impact. Once again referring to MIT's Apollo project, a digital watermark or audial disclaimer was not necessary to convey to the viewer the video's authenticity (or lack thereof) due to the surrounding context it was created in. Meanwhile, a deepfake that is accompanied by a watermark disclaimer, but is shared to a subgroup that is known to possess the ability to remove such watermarks[188] and spread the manipulated content to other communities as if it were real, would have much greater foreseeable harm. This would be true despite the fact that a disclaimer, and even what is thought to be a highly effective one, was attached.

vi. Who and What are Depicted?

A foreseeability test would also allow for consideration of what the deepfake depicts and whom it targets. Certainly, the candidate or campaign a deepfake targets will impact the extent of

reduce the chance that they are found liable without mandating a disclaimer in order to avoid liability.

[187] Pesetski, supra note 126, at 529; Coldeway, supra note 143.

[188] Coldeway, supra note 143.

its potential harm. Some elections are of higher and broader profile, thus allowing for a greater audience to be deceived and affected downstream. There are also certain candidates that inspire more significant partisan opposition, which in conjunction with extremism and the familiarity effect may increase the likelihood of deleterious effects.

Additionally, this approach could take into account whether the deepfake depicts the candidates themselves, someone associated with a campaign, or something else entirely but that is intended to impact viewers' impression of a campaign. Presumably, the more directly targeted at a candidate, the more foreseeable the impact. There is certainly still a possibility, however, that a candidate or their campaign could be significantly harmed by a deepfake that manipulates content of someone or something other than the candidate.[189] Notably, of the current laws in place, some appear to restrict liability to deepfakes that depict the candidate themselves, whereas others do not require that the candidate be depicted so long as it is meant to alter the viewer's impression of the campaign or election.[190] All of the current laws, however, do require that the deepfake depict a person.[191] Thus, a deepfake placing a candidate's spouse or campaign manager in a compromising context would escape the grasp of some current laws. And a deepfake falsely portraying an object or event -- including, but not limited to: controversial documents, the destruction of property, or a campaign vehicle engaging in illegal conduct -- would fall outside the ambit of all current laws. Yet, the publication of these examples and others like them could significantly harm a candidate or alter an election.

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[189] Ice, supra note 89, at 434 (discussing how there are more damages than just reputational to the person depicted). It is beyond the scope of this Note to address in its entirety the necessity to broaden the scope of deepfakes for which victims may seek recourse, but it is worth addressing how such an expansion would fit into the framework of a foreseeable harm standard.
[190] Part I supra.
[191] Part I supra.

The strength of a foreseeable harm standard is its adaptability. By limiting "on-off switch" provisions and instead considering the myriad factors that may increase a deepfake's danger, it is possible to reverse course from the over- and under-inclusivity of current laws. Of course, given this test's flexibility, it is necessary to ground our approach in existing law to reap these constitutional and policy benefits.

B. Support for a Foreseeable Harm Approach

Once again using United States v. Alvarez as a barometer, this section seeks to draw out support for the foreseeable harm standard. In addition to sidestepping some of the pitfalls that the Stolen Valor Act fell into, this approach can also find direct support in Alvarez, particularly in Justice Breyer's concurrence. Finally, this section draws analogies to the use of different "reasonable person" standards and identifies the proper positioning of deepfakes in this framework.

i. Justice Breyer's Concurrence

Justice Breyer discusses some types of speech restrictions that have been justified, as well as the limitations that allowed them to satisfy the requisite level of scrutiny.[192] One such example is false claims of terrorist attacks. In order for liability to attach in this context, there must be "proof that substantial public harm [was] directly foreseeable, or, if not, [the claim must] involve false statements that [we]re very likely to bring about that harm."[193] Justice Breyer distinguishes this requirement from the "mere speech" required by the Stolen Valor Act.[194] Justice Breyer also briefly touches on claims for trademark infringement; these claims require a finding that the

[192] See supra note 101 for a discussion of Justice Breyer's and Justice Kennedy's differing views on the appropriate tier of scrutiny applied in these cases.
[193] United States v. Alvarez, 567 U.S. 709, 735 (2012) (Breyer, J., concurring).
[194] Id. at 735 (Breyer, J., concurring).

infringement is "likely to dilute the value of the mark" or is likely to cause confusion.[195] Building upon the notion that speech restrictions be limited to contexts in which the greatest degree of harm may arise, this use of foreseeable harm as the test for liability suggests that it also matters how foreseeable the specific harm in question was to the perpetrator.

Trademark infringement claims, along with impersonating a public official, which Justice Breyer also touches on, are surprisingly analogous to deepfakes.[196] The tortfeasor is attempting to capitalize on the inherent authority and believability of the brand they are attempting to resemble, the role they are pretending to hold, or the mere fact that we believe what we see, to alter the perception of their audience.[197] Similarly, as Justice Breyer notes, this is more than "mere speech:"[198] impersonating a public official -- or publishing a deepfake -- is an act meant to gain more credibility than if you simply made a false statement. Thus, attaching liability "may require a showing that, for example, someone was deceived into following a course [of action] he would not have pursued but for the deceitful conduct."[199]

Further, Justice Breyer explicitly recognized that "[i]n the political arena a false statement is more likely to make a behavior difference."[200] We should be careful, therefore, to consider the effects a deepfake could have on a viewer's subsequent political behavior. The more

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[195] Id. at 735-36 (Breyer, J., concurring).
[196] This is a different similarity than that which Justice Breyer considered between trademark infringement and the Stolen Valor Act.
[197] Sunstein, supra note 77, at 422; Ice, supra note 89, at 434 (describing the authority and believability garnered by deepfakes); Alvarez, 567 U.S. at 735 (Breyer, J., concurring) (explaining the role of seeking credibility when impersonating a public official).
[198] Alvarez, 567 U.S. at 735 (Breyer, J., concurring).
[199] Id. at 735 (Breyer, J., concurring) (quoting United States v. Lepowitch, 318 U.S. 702, 704 (1943).
[200] Id. at 738 (Breyer, J., concurring). Notably, Breyer highlighted that the harm that could result from restricting speech is also heightened, making it particularly important to strike the right balance.

likely a speaker's conduct is to lead their audience to change their behavior in accordance with the false statement -- in this context, a deepfake -- the more appropriate liability is for the perpetrator.

ii. The "Reasonable Person" Standard

Beyond the First Amendment examples listed in Justice Breyer's concurrence in Alvarez, it's important to recognize that this is far from a novel legal standard. Foreseeability has a well-established history in tort and contract law,[201] asking how likely it was that a reasonable person could have anticipated the potential or actual results of their actions.[202] Notably, the "reasonable person" standard mentioned here is not the same as the "reasonable person" standard incorporated in current deepfake laws. In fact, it is flipped on its head. Rather than asking if a reasonable person would be deceived by the deepfake, we would ask whether a reasonable

[201] Foreseeable harm is considered in a variety of tort and contract claims, such as harmful battery, see Cornell Law School, Battery, **Wex**, https://www.law.cornell.edu/wex/battery, as well as intentional and negligent infliction of emotional distress, see Cornell Law School, Intentional Infliction of Emotional Distress, **Wex**, https://www.law.cornell.edu/wex/intentional_infliction_of_emotional_distress; Cornell Law School, Negligent Infliction of Emotional Distress, **Wex**, https://www.law.cornell.edu/wex/negligent_infliction_of_emotional_distress. Specifically, in the First Amendment context, foreseeability is considered for determining the characterization of "fighting words" and incitement. Gersh v. Anglin, 2018 WL 4901243 (D.MT. May 3, 2018), at *3. Notably, Gersh was decided after Alvarez and referenced Alvarez in its discussion of exceptions to the First Amendment right to free speech.

[202] Cornell Law School, Foreseeability, **Wex**, https://www.law.cornell.edu/wex/foreseeability; Cornell Law School, Foreseeable Risk, **Wex**, https://www.law.cornell.edu/wex/foreseeable_risk. Recognizing the existing use of this standard may also serve to answer a possible question for a foreseeable harm approach: what is "foreseeable?" Armed with this established definition, we must only ask if, at the time of the deepfake's dissemination, a reasonable person in the defendant's position should have known that the harm might occur. With the knowledge of where and when they post the deepfake, the type of disclaimer they attach, whom or what the deepfake depicts, and their own identity, among other considerations, the publisher is in a good position to assess the relevant factors at play.

person publishing the deepfake would have known that harm would result.[203] This version of the reasonable person standard is meant to ascertain whether "an ordinary person in the same circumstance would have reasonably acted in the same way."[204] It is a defense to the tortfeasor's behavior, not a measure of the victim's harm.

The current laws, which ask if a reasonable viewer would have been deceived by the deepfake, are more aligned with the common features of assault and harassment claims, which ask if a reasonable person would have felt threatened or harassed, respectively, by the defendant's conduct.[205] Harm arising from a deepfake, however, is distinguishable from each of these claims.

In the context of harassment, in addition to determining that the claimant actually found the conduct offensive, we ask whether a reasonable person would have found the conduct offensive.[206] For assault claims, though we have already established that the defendant intended to cause the apprehension of physical harm, we ask if the plaintiff reasonably apprehended a future physical harm to themselves.[207]

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[203] For a discussion of a similar approach to assigning liability in defamation cases, see Alex B. Long, All I Really Need to Know About Defamation Law in the 21st Century I Learned From Watching Hulk Hogan, 57 **Wake Forest L. Rev**. 101, 147 (2022) (discussing how the Texas Supreme Court in the case of Bollea v. World Championship Wrestling asked if "the publisher either kn[e]w or ha[d] reckless[ly] disregard[ed] whether the article could reasonably be interpreted as stating actual facts"). This Note argues that, in the context of politically-oriented deepfakes, the Texas Supreme Court's analysis should take the next step to exclude the requirement of a reasonable viewer so long as the publisher could themselves reasonably foresee the harm to follow.

[204] Cornell Law School, Foreseeability, **Wex**, https://www.law.cornell.edu/wex/foreseeability.

[205] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (in a case of workplace harassment, remanding for the lower court to determine if the conduct was both subjectively and objectively "hostile or abusive" (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 67 (1986))); Cornell Law School, Harassment, **Wex**, https://www.law.cornell.edu/wex/harassment; Cornell Law School, Assault, **Wex**, https://www.law.cornell.edu/wex/assault.

[206] Cornell Law School, Harassment, **Wex**, https://www.law.cornell.edu/wex/harassment.

[207] Cornell Law School, Assault, **Wex**, https://www.law.cornell.edu/wex/assault.

On the other hand, when determining the harm of a deepfake, we do not ask whether the viewer -- the deceived -- would reasonably fear a future harm to themselves, nor does it matter whether the deceived was reasonably offended. We still consider future harm in the deepfake context when we consider whether the deception of the viewer led to harm to a candidate's reputation or undue influence on an election. But this is not harm to the deceived. Rather, the deceived is used as an agent to harm a candidate or the election process. The deceived is not seeking redress for themselves. Instead, the person whose reputation was harmed, or who was impacted by an election interference scheme, is seeking redress for the harm done to them by the perpetrator -- using the deceived as an agent. Thus, whether the deceived was a "reasonable person" should not impact the remedies available: either way, the ultimate victim was still harmed. So, much like the above-mentioned torts, we should be asking if the perpetrator acted reasonably: if they should have foreseen the result of their actions.[208]

The proposed House Bill does contemplate a form of foreseeable harm requirement: one of the requirements for liability to attach, in the case of a deepfake depicting a deceased person, is that the deepfake is "substantially likely to either further a criminal act or result in improper interference in an official proceeding, public policy debate, or election."[209] However, this provision is limited to that narrow category of deepfakes, the proposed bill also retains several of the aforementioned troublesome elements including the reasonable viewer standard, and it only

[208] Foreseeable harm is also a recurring test in criminal law. For example, those states that determine co-conspirator liability under the Pinkerton v. United States standard ask whether the harm was "reasonably foreseeable as a necessary or natural consequence" of their actions. 328 U.S. 640, 648 (1946). Likewise, when considering whether a subsequent event severs the causal link from a defendant's actions to the harm suffered, we ask whether the intervening cause was reasonably foreseeable to the defendant at the time of their misconduct. See People v. Rideout, 727 N.W.2d 630, 633 (2006).

[209] H.R. 2395 DEEP FAKES Accountability Act, 117th Congress (2021).

speaks to foreseeable harm in terms of election interference, excluding reputational harm to the candidate alone.[210] Though this proposed language still differs from this Note's proposal, and the bill has not been passed from the House to the Senate to date, it does demonstrate the potential for a move toward this test for liability down the road.

Conclusion

As deepfake technology continues to develop and cases start to make their way through the courts, it will be important to have an effective, workable, and constitutional approach to assigning liability for the detrimental effects deepfakes can have on our elections. In place of the patchwork system of binary, often ill-fitting rules that current attempts at deepfake statutes have utilized, a foreseeable harm, totality of the circumstances test will allow for the flexibility to appropriately address the most insidious deepfakes without unnecessarily curtailing protected First Amendment speech. Using foreseeable harm as the standard is both more narrowly tailored than current statutes and is supported in existing law, including the Supreme Court's guidance in United States v. Alvarez. The House of Representative's proposed bill to address deepfakes exhibits the first signs of moving towards a foreseeable harm standard; perhaps a more full-scale adoption of this approach is yet to come.

[210] Id.

Applicant Details

First Name	**Daniel**
Middle Initial	**W.**
Last Name	**Xu**
Citizenship Status	**U. S. Citizen**
Email Address	**daniel.xu@emory.edu**
Address	**Address** Street **1084 Mill Field Ct.** City **Great Falls** State/Territory **Virginia** Zip **22066** Country **United States**
Contact Phone Number	**7036063450**

Applicant Education

BA/BS From	**College of William and Mary**
Date of BA/BS	**May 2021**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 7, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Emory Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization**

Recommenders

Smith, Fred
fred.smith@emory.edu
Hawkins, Haley
haley_hawkins@dcd.uscourts.gov
Kirk, Aaron
akirk@emory.edu

References

Judge Jill A. Pryor, U.S. Court of Appeals for the Eleventh Circuit (404-335-6525); Elizabeth Eager, Career Clerk to Judge Jill A. Pryor (404-335-6525); Ebony Brown, Staff Attorney at the Southern Center for Human Rights (404-688-1202 Ext. 219 or ebrown@schr.org)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel W. Xu
1084 Mill Field Ct.
Great Falls, VA 22066
daniel.xu@emory.edu
(703) 606-3450

July 14, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Detroit, Michigan

Dear Judge Davis:

I am a rising third-year student at the Emory University School of Law, and am writing to apply for a clerkship in your chambers for the 2024–2025 term.

While in law school, I have developed strong legal research and writing skills—producing a student comment that will be published in the *Emory Law Journal*, submitting written advocacy to the Alabama Parole Board, and drafting memoranda for the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the Eleventh Circuit. In each instance, I received praise for my thorough research, clear prose, and robust analysis. As such, I am confident in my ability to succeed as a law clerk.

My desire to clerk is driven by a deep belief in public service. Through my externships and volunteer work, I have seen the tangible effects that our legal system can have on individuals and their communities. These experiences have reinforced my decision to pursue a public interest career. Serving as your clerk would allow me to gain insight on our judicial system's role in promoting fairness and justice, enabling me to be a more effective advocate in the future.

I have enclosed my resume, law school transcript, two writing samples, and three letters of recommendation. The Honorable Jill A. Pryor, U.S. Circuit Judge for the Eleventh Circuit Court of Appeals, and her career law clerk, Elizabeth Eager, have also agreed to serve as references for my application. They can both be reached at (404) 335-6525. Ebony Brown, Staff Attorney at the Southern Center for Human Rights, has agreed to serve as a reference as well; she can be contacted at (404) 688-1202 Ext. 219 or ebrown@schr.org.

If you have any questions, or should you need any additional materials, I can be contacted at (703) 606-3450 or daniel.xu@emory.edu. Thank you for your consideration.

Respectfully,

Daniel W. Xu

Enclosures

DANIEL W. XU

1084 Mill Field Ct., Great Falls, VA 22066
703-606-3450 | daniel.xu@emory.edu

EDUCATION

Emory University School of Law — **Atlanta, GA**
J.D. Candidate — May 2024

- GPA: 3.775 (Top 10%)
- Journal: *Articles Editor*, Emory Law Journal. Selected for publication in Volume 73 (forthcoming 2024)
- Awards: Justice John Paul Stevens Public Interest Fellow, Dean's List (all semesters)
- Activities: Civil Rights Society, American Constitution Society, Asian Pacific American Law Student Association, Emory Public Interest Committee, Morningside House Coordinator, DeKalb County Election Clerk, Selected as a Research Assistant for Professor Fred Smith Jr. (Fall 2023)

The College of William & Mary — **Williamsburg, VA**
B.A. in Public Policy, Minor in Economics — May 2021

- Activities: *Fellow*, D.C. Institute for American Politics; *President*, Kappa Delta Rho Fraternity; Orientation Aide; *Residential Program Assistant*, National Institute of American History & Democracy

EXPERIENCE

Federal Defender Program, Inc. — **Atlanta, GA**
Selected as a Fall 2023 Legal Extern — August 2023 – November 2023

ACLU of the District of Columbia — **Washington, D.C.**
Legal Intern — May 2023 – Present

- Researched and wrote memoranda on matters related to the Americans with Disabilities Act, the Rehabilitation Act, the D.C. Human Rights Act, Title VII of the Civil Rights Act, and the Religious Freedom Restoration Act
- Drafted complaints, motions, and other documents for ongoing and contemplated litigation
- Created "Know Your Rights" presentations for demonstrations and protests in D.C.

U.S. Court of Appeals for the Eleventh Circuit — **Atlanta, GA**
Judicial Extern for the Honorable Jill A. Pryor — January 2023 – April 2023

- Researched and drafted bench memoranda and opinions for cases on appeal before the Court
- Observed oral arguments before three-judge panels, as well as rehearings en banc
- Assisted chambers by writing case summaries and literature reviews

Southern Center for Human Rights — **Atlanta, GA**
Legal Extern — September 2022 – November 2022

- Advocated for a client, under attorney supervision, before the Alabama Board of Pardons and Paroles. Spoke with them in prison, conducted family interviews, and delivered oral and written testimony in support of their release
- Investigated juror information for a *Batson* challenge against a prosecutor's preemptory strikes
- Researched recent capital murder dispositions as part of an effort to negotiate a favorable plea bargain

U.S. District Court for the District of Columbia — **Washington, D.C.**
Judicial Intern for the Honorable Reggie B. Walton — May 2022 – July 2022

- Researched and drafted memorandum opinions resolving 12(b)(1) and 12(b)(6) motions to dismiss
- Proofread documents and citations written by clerks, court attorneys, and other interns
- Observed jury trials, motion hearings, re-entry progress hearings, and other court proceedings

Emory LGBTQ+ Legal Services Clinic — **Atlanta, GA**
Clinic Volunteer — October 2021 – May 2022

- Examined state-level approaches to conversion therapy regulation. Reviewed how states and circuits addressed marriage equality prior to *Obergefell v. Hodges*. Analyzed cases, state constitutions, and state statutes

Chicago Justice Project — **Chicago, IL**
Open Cities Project Remote Volunteer — October 2021 – December 2021

- Researched and drafted legal memoranda on public information laws and the availability of police accountability data

ICF International, Inc. (ICF) — **Fairfax, VA**
Workforce Innovations and Poverty Solutions (WIPS) Intern — June 2020 – August 2020

- Drafted literature reviews on community victimization, social determinants of health, and workforce readiness

ADDITIONAL INFORMATION

Fluent Mandarin speaker. Former competitive chess player (USCF 1631). Avid Washington Wizards fan.

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Institution Info: Emory University
Student Address: 1084 Mill Field Ct
Great Falls, VA 22066-1868
Print Date: 05/16/2023

Beginning of Academic Record

Fall 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure [Professor George Shepherd]	4.000	4.000	A-	14.800
LAW	510	Legislation/Regulation [Professor Matthew Lawrence]	2.000	2.000	A-	7.400
LAW	520	Contracts [Professor Martin Sybblis]	4.000	4.000	A-	14.800
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm [Professor Aaron Kirk]	2.000	2.000	A	8.000
LAW	550	Torts [Professor Alexander Volokh]	4.000	4.000	B+	13.200
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.638	Term Totals	16.000	16.000	16.000	58.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.638	Comb Totals	16.000	16.000	16.000	58.200
Cum GPA	3.638	Cum Totals	16.000	16.000	16.000	58.200
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.638	Comb Totals	16.000	16.000	16.000	58.200

Spring 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Criminal Law [Professor John Witte, Jr.]	3.000	3.000	A	12.000
LAW	530	Constitutional Law I [Professor Darren Hutchinson]	4.000	4.000	A	16.000
LAW	535B	Introduction to Legal Advocacy [Professor Aaron Kirk]	2.000	2.000	A	8.000
LAW	545	Property [Professor Robert Parrish]	4.000	4.000	A	16.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	701	Administrative Law [Professor Thomas Arthur]	3.000	3.000	B+	9.900

			Attempted	Earned	GPA Units	Points
Term GPA	3.869	Term Totals	16.000	16.000	16.000	61.900
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.869	Comb Totals	16.000	16.000	16.000	61.900
Cum GPA	3.753	Cum Totals	32.000	32.000	32.000	120.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.753	Comb Totals	32.000	32.000	32.000	120.100

Fall 2022

Program: Doctor of Law
Plan: Law Major

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Course		Description	Attempted	Earned	Grade	Points
LAW	669	Employment Discrimination [Professor Marcus Keegan]	3.000	3.000	A	12.000
LAW	747	Legal Profession [Professor Jennifer Romig]	3.000	3.000	B+	9.900
LAW	844A	Judicial Decision Making [Professor Jonathan Nash]	3.000	3.000	A	12.000
LAW	870A	EXTERN: Public Interest	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
Course Topic:		Fieldwork: 150 Hours (2 units)				

			Attempted	Earned	GPA Units	Points
Term GPA	3.767	Term Totals	12.000	12.000	9.000	33.900
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.767	Comb Totals	12.000	12.000	9.000	33.900
Cum GPA	3.756	Cum Totals	44.000	44.000	41.000	154.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.756	Comb Totals	44.000	44.000	41.000	154.000

Spring 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	632X	Evidence [Professor Lesley Carroll]	3.000	3.000	B+	9.900
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	721	Federal Courts [Professor Fred Smith Jr.]	3.000	3.000	A	12.000
LAW	729X	State Constitutional Law [Professor Fred Smith Jr. & Justice David Nahmias]	2.000	2.000	A	8.000
LAW	870E	EXTERN: Judicial	1.000	1.000	S	0.000
LAW	871	Extern: Fieldwork	2.000	2.000	S	0.000
LAW	885	Emory Law Journal:Second Year [Professor Fred Smith Jr.]	2.000	2.000	A+	8.600

			Attempted	Earned	GPA Units	Points
Term GPA	3.850	Term Totals	15.000	15.000	10.000	38.500
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.850	Comb Totals	15.000	15.000	10.000	38.500
Cum GPA	3.775	Cum Totals	59.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	59.000	59.000	51.000	192.500

Fall 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	622A	Const'lCrim.Proc:Investigation	3.000	0.000		0.000
LAW	635	Child Welfare Law and Policy	2.000	0.000		0.000
LAW	675	Constitutional Lit	3.000	0.000		0.000
LAW	731L	Crimmigration	2.000	0.000		0.000
LAW	860A	Colloquium Series Workshop	2.000	0.000		0.000
LAW	870I	EXTERN: Advanced	1.000	0.000		0.000
LAW	871	Extern: Fieldwork	2.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	15.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	15.000	0.000	0.000	0.000

Advising Document - Do Not Disseminate

Name: **Daniel Xu**
Student ID: **2537607**

Cum GPA	3.775	Cum Totals	74.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	74.000	59.000	51.000	192.500

Law Career Totals

Cum GPA:	3.775	Cum Totals	74.000	59.000	51.000	192.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.775	Comb Totals	74.000	59.000	51.000	192.500

End of Advising Document - Do Not Disseminate

EMORY LAW

Fred Smith, Jr.
Charles Howard Candler Professor of Law

July 16, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Recommendation Letter for Daniel Xu

Dear Judge Davis:

It is my pleasure to recommend Daniel Xu—an exceptional student in Emory Law School's class of 2024— for a judicial clerkship. Over the past year, I have assessed Daniel's clerkship potential in three settings. First, he authored a substantial research paper that I supervised. Second, Daniel enrolled in a small, writing-intensive seminar that I co-taught. Third, I taught Daniel in Federal Courts. My resultant impression is that Daniel would make a first-rate clerk. Indeed, I have invited him to serve as my research assistant next year. He is brilliant, mature, inquisitive, and kind. Further, he writes with elegance, clarity, and sophistication. I recommend him enthusiastically.

I first encountered Daniel in the fall of his second year of law school, when he asked me to serve as his advisor for a research paper he was submitting to the Emory Law Journal. (Each year, students on the journal write and submit research papers for potential publication.) Daniel chose to write about state criminal liability for unconstitutional violence. Because he chose to write about state law rather than federal law, he had to carefully canvas relevant legal regimes in all fifty states. Moreover, he needed to identify trends and flaws in current doctrine as he developed a workable, balanced recommendation. I was impressed with his detailed research and careful analysis. Further, I appreciated how receptive he was to critical feedback. He genuinely welcomed the opportunity to work through potential gaps in his arguments as he edited the paper. That said, Daniel is no pushover. He defended his ideas where appropriate with well-reasoned arguments and data. It was no surprise to me at all that Emory Law Journal ultimately selected his piece of publication. I assigned the paper an A+.

The second setting in which I have gotten to know Daniel is a class called State Constitutional Law that I co-teach with a former Chief Justice of the Georgia Supreme Court. Eighteen students are enrolled in the class. All are expected to do fairly heavy reading and come

Emory University
Gambrell Hall
1301 Clifton Road
Atlanta, Georgia 30322-1013
An equal opportunity, affirmative action university

fred.smith@emory.edu
Tel 706.540.4525
Fax 404.727.6820

to class prepared to carefully engage in discussions. Students also submit two required papers over the course of the semester. In this class, Daniel was one of the stars. It was genuinely a joy to call on him in class because I always knew his comments would be filled with non-obvious insights that meaningfully advanced the discussion. I learned a great deal from that commentary.

Moreover, Daniel authored two excellent papers for State Constitutional Law. The first paper was about educational adequacy requirements in state constitutions. In my written feedback to Daniel about the paper, I called it "thoughtful," "well-balanced," and "insightful." The second paper addressed the intersection of property rights and economic development. In my written feedback, I called it "excellent work," "well-reasoned," and "easy to follow. My colleague offered similarly high praise of both papers. Daniel was one of the few students in the course who received an A on both of the assigned papers. Ultimately, he earned an A in the course.

Another setting where I got to know Daniel was in Federal Courts during the second semester of his 2L year. That course covers topics that are central to any Article III clerkship: subject matter jurisdiction; appealability; justiciability; abstention; immunity; Congressional control of federal courts; and habeas. The habeas component of that course involves a deep dive into the most complex aspects of habeas: procedural default; second or successive petitions; retroactivity; deference to state court adjudications under 28 U.S.C. §2254(d); and exhaustion. Daniel's visits to office hours and his commentary in class showed careful engaged these complex doctrines. It was therefore not a surprise that of the 69 students who enrolled in Federal Courts, Daniel wrote the third best exam in the class. Accordingly, he earned an A. For context, Federal Courts consistently attracts the top students at Emory Law and, as such, it is exceptionally difficult to earn an A in that setting.

I hope this letter conveys my enthusiastic endorsement of this clerkship application. Daniel is going to make a formidable lawyer. As he begins that path, any chambers would be fortunate to have him as a clerk. He has a gift for seeing both the big picture and the details. He writes beautifully and clearly. And he is a pleasure with whom to work. If you have any further questions, please do not hesitate to contact me at 706-540-4525.

Best regards,

Fred Smith, Jr.

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Reggie B. Walton
United States District Judge

October 14, 2022

Dear Judge:

I write to enthusiastically recommend Daniel Xu for a clerkship in your chambers. I currently serve as a law clerk to the Honorable Reggie B. Walton of the United States District Court for the District of Columbia.

Daniel served as one of nine interns in Judge Walton's chambers during the summer of 2022, and was a stand-out, both in terms of his work product and engagement as part of our chambers community. Interns for Judge Walton are responsible for drafting substantive writing assignments resolving pending motions in active cases before Judge Walton, including memorandum opinions, orders, and bench memoranda; editing and Bluebooking opinions and orders drafted by Judge Walton's clerks; and attending Judge Walton's hearings.

As Daniel's supervisor, I found that his work to be very strong. For his main substantive assignment, he prepared a memorandum opinion resolving a pending motion to dismiss in a civil case. This assignment required significant research skills, analysis, and critical thinking on Daniel's part, as it presented a novel issue over which there is currently a circuit split and no clear D.C. Circuit precedent. Daniel not only met, but exceeded, this challenge. His research was thorough, and his draft was well-constructed and required fewer edits than I would normally give to an intern. Throughout this assignment, Daniel took the initiative to set up in-person meetings with me to orally discuss his research findings and the progress of his assignment, demonstrating effective communication skills. These conversations with Daniel reminded me of the collaborative conversations I often have with my co-clerks—conversations which I have found to be an essential part of a well-functioning chambers environment.

Additionally, Daniel is a pleasant and friendly person. He took the initiative to get to know Judge Walton and his law clerks on a personal level and was well-liked in chambers. I have no doubt that Daniel's capacity for critical thinking, strong writing and research skills, and collegiality would make him a valuable addition to any chambers. I would be happy to discuss his qualifications in further detail and can be reached at (336) 404-2873.

Sincerely,

Haley Hawkins
Law Clerk to the Hon. Reggie B. Walton
Term: October 2021 to September 2023

July 16, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Re: Clerkship Application of Daniel Xu

Dear Judge Davis:

I am writing with enthusiasm to recommend Daniel Xu for a clerkship. Daniel is an excellent student, legal analyst, and writer. I am confident that as a judicial clerk, he will apply his formidable skills with great success.

Daniel was a student in my Introduction to Legal Analysis, Research, and Communication course at Emory University School of Law during his first year in law school (the 2021 fall semester and the 2022 spring semester). My class is very writing intensive. In the fall semester, students write two memoranda based on state law issues. In the spring semester, they write an appellate brief based on an issue of federal law and participate in an oral argument exercise. Throughout the year, I review and provide feedback on multiple drafts of their written work and discuss their work with them individually.

I have taught law students for 15 years, and Daniel was one of my very best students. During the two semesters I taught him, Daniel's analysis consistently was clear eyed and his work product polished. He was writing at the level of a junior attorney by the middle of the fall semester.

In addition, Daniel was a pleasure to work with both in and outside of class. Daniel is very responsive to constructive criticism. I demand a lot from my students, and many become frustrated by my expectations. If Daniel ever was frustrated, he never showed it. To the contrary, he was a model of professionalism. I always looked forward to his visits during my office hours; Daniel is personable and engaging, and his views are insightful.

I have no doubt that Daniel will excel at any legal endeavor to which he applies his considerable skills, and I am confident that he will be an excellent judicial clerk after he graduates. I highly

EMORY
SCHOOL OF
LAW

recommend Daniel for a clerkship. Please feel free to contact me if you wish to discuss his candidacy.

Very truly yours,

Aaron R. Kirk
Professor of Practice, Introduction to Legal Analysis, Research, and Communication and Introduction to Legal Advocacy

DANIEL W. XU
1084 Mill Field Ct., Great Falls, VA 22066 | 703-606-3450 | daniel.xu@emory.edu

WRITING SAMPLE

This memorandum opinion draft was researched and written during my summer internship in the Chambers of the Honorable Reggie B. Walton, United States District Judge for the District of Columbia. It is my original work, but reflects feedback from my supervising clerk. It has been redacted, condensed, and approved for use as a writing sample.

Written Summer 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[redacted], Plaintiff,	)	
v.	)	Civil Action No. [redacted]
[redacted], Defendant.	)	

MEMORANDUM OPINION

The plaintiff, [redacted], brings this civil action against the defendant [redacted], asserting a violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. ("ADA"). See Amended Complaint ("Am. Compl.") at 1, ¶¶ 7–14, ECF No. 32. Currently pending before the Court is the Defendant's Motion to Dismiss ("Def.'s Mot." or the "defendant's motion"), ECF No. 31. Upon careful consideration of the parties' submissions,[1] the Court concludes for the following reasons that it must grant the defendant's motion to dismiss to the extent that it seeks dismissal for failure to state a claim but deny it in all other respects.

I. BACKGROUND

A. Factual Background

The plaintiff initiated this civil action on August 11, 2020. See generally Compl. ¶ 18. The plaintiff resides in [redacted], and states that she is "an individual with disabilities as defined by the ADA." Am. Compl. ¶ 1. She requires various accommodations because she is "unable to . . . walk[] more than a few steps without assistive devices[,] . . . is bound to . . . a wheelchair[,] . . . and has limited use of her hands." Id. The defendant owns a "place of public accommodation . . . known as [redacted][,]" located on [redacted] in Washington, D.C. (the "hotel"), id. ¶ 2, and utilizes an online reservations system ("ORS" or "websites") so that "members of the public may reserve guest accommodations and review

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the plaintiff's original Complaint ("Compl."), ECF No. 2; (2) the plaintiff's Statement Made Pursuant to 28 U.S.C. Section 1746 ("Pl.'s Statement"), ECF No. 29-2; (3) the Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss ("Def.'s Mem."), ECF No. 31-1; (4) the Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Pl.'s Opp'n"), ECF No. 33; (5) the Defendant's Supplemental Authority in Support of Motion to Dismiss ("Def.'s Suppl. Auth."), ECF No. 34; and (6) the Plaintiff's Response to Notice of Supplemental Authority ("Pl.'s Resp. Suppl. Auth."), ECF No. 35.

information pertaining to . . . [the] accommodations of the [hotel,]" id. ¶ 9. This ORS includes third-party websites such as booking.com, expedia.com, and priceline.com. See id. The defendant is being sued for alleged violations of 28 C.F.R. § 36.302(e) and Title III of the ADA. See id. at 1, 11 ¶¶ 6–10, 13, 19, 22, 24.

This action is one of many similar lawsuits that have been initiated by the plaintiff around the country. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]) ("In total, [the p]laintiff has filed at least 557 suits in sixteen different states, plus the District of Columbia."). The plaintiff identifies as a "tester" who files such actions "for the purpose of asserting her civil rights and . . . determining whether places of public accommodation . . . are in compliance with the ADA." Compl. ¶ 2. Despite the plaintiff's use "of nearly identically drafted [c]omplaints[,]" her lawsuits have generated inconsistent rulings, with "myriad decisions cutting both ways across the country." [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]) (citation omitted). Notably, another member of this Court recently dismissed one of the plaintiff's lawsuits for lack of standing. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D.D.C. [redacted]), aff'd, [redacted], [redacted] WL [redacted] (D.C. Cir. [redacted]).

In the case currently before the Court, the plaintiff visited the defendant's ORS in July 2020 "for the purpose of reviewing and assessing the accessible features at the [hotel] and ascertain[ing] whether they met the requirements of [the ADA Regulation.]" Am. Compl. ¶ 10. She wanted to "ascertain[] whether or not she would be able to stay at the hotel[,]" as she "planned to travel to various states around the country, including Washington, D.C.[,] as soon as the [COVID-19] crisis abated[.]" Id. However, the plaintiff was unable to do so because the defendant's ORS "did not identify or allow for reservation of accessible guest rooms and did not provide sufficient information regarding accessibility at the hotel." Id. at ¶ 10.

In June 2021,[2] the plaintiff "again reviewed [the d]efendant's ORS and found that it still did not comply with the [ADA] Regulation[.]" Id. ¶ 13. She did so "for the purpose of planning her [upcoming] trip and ascertaining where on her trip she would be able to book an accessible room at an accessible hotel." Id. That summer,[3] the plaintiff traveled by car through Washington, D.C., and several other states (the "summer 2021 trip"). See id. While in Washington, D.C., she "needed a hotel to stay in[.]" Pl.'s Opp'n at 4. However, since the defendant's ORS did not contain accessibility information that was required by the ADA Regulation, the plaintiff alleges that she was unable to "ascertain[] whether . . . she would be

[2] There are inconsistencies in the plaintiff's filings about the timing of this ORS visit. In her Amended Complaint and Response to Supplemental Authority, the plaintiff states that she visited the ORS in June 2021. See Am. Compl. ¶ 13; Pl.'s Resp. Suppl. Auth. at 2. However, in her Opposition, she states that this occurred in August 2021. See Pl.'s Opp'n at 4. Based upon the temporal proximity of these inconsistencies, as well as the fact that these ORS visits occurred for the purpose of planning the same cross-country trip, the Court infers that these filings refer to the same incident. Accordingly, the Court will thereafter refer to this ORS visit as the "June 2021" visit.

[3] There are also inconsistencies in the plaintiff's filings about the month that this trip occurred. In her Amended Complaint, Response to Supplemental Authority, and Statement, the plaintiff states that this trip occurred in July 2021. See Am. Compl. ¶ 13; Pl.'s Resp. Suppl. Auth. at 2; Statement ¶ 2. However, in her Opposition, the plaintiff states that this trip occurred after she "reviewed the [defendant's] ORS in August 2021[.]" See Pl.'s Opp'n at 4. Based upon the temporal proximity of these dates, and the lack of indication that the plaintiff took multiple trips, the Court infers that these filings refer to the same trip. As such, the Court will refer to it as the "summer 2021 trip."

able to stay at the hotel during her trip[,]" Am. Compl. ¶ 10, and "deprived . . . of the ability to book an accessible room in the same manner as other non-disabled persons," Pl.'s Opp'n at 4. The plaintiff states that it was "extremely difficult to find hotels with accessible rooms" and that "there were occasions when [she] had to sleep in [her] car." Pl.'s Statement ¶ 4. The plaintiff further represents that she:

> intends that, in December 2022, she will again drive from Florida to such states as New York, Maine, etc. and will therefore drive through Washington, D.C., and will need hotels along her route to comply with the [ADA] Regulation so that she can have the information she needs to select a hotel and book a room

(the "December 2022 trip"). Am. Compl. ¶ 15. During this trip, the plaintiff "will . . . revisit[the defendant's ORS] when looking for a place to stay for the night." Pl.'s Statement ¶ 5.

B. Statutory Background [Section Omitted]

C. Procedural History [Section Omitted]

II. STANDARDS OF REVIEW [Section Omitted]

III. ANALYSIS

The plaintiff alleges that "[t]he violations present at [the d]efendant's websites . . . deprive her of the information required to make meaningful choices for travel . . . and [that she] continues to suffer frustration and humiliation as the result of [those] discriminatory conditions[.]" Am. Compl. ¶ 17. She states that these violations "contribute[] to [her] sense of isolation and segregation . . . and deprive[her] of [the] equality of opportunity offered to the general public." Id. She also alleges that the defendant's violations caused her "stigmatic injury and dignitary harm because it was difficult to find hotels in which to stay[.]" Id. ¶ 15. As a result, the plaintiff has requested declaratory and injunctive relief from the Court. Id. at 11.

The defendant seeks dismissal of the plaintiff's Amended Complaint under both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Def.'s Mot. at 1. First, the defendant argues that the plaintiff's Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because the "[p]laintiff does not have standing to bring this action." Def.'s Mem. at 4. Second, the defendant argues that the plaintiff's allegations "contain[] none of the essential facts required to state a claim[,]" and therefore, should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Def.'s Mem. at 10–11.

Because a 12(b)(1) motion "presents a threshold challenge to [a] court's jurisdiction[,]" Haase, 835 F.2d at 906, and because a court "can proceed no further" if it lacks subject matter jurisdiction, Simpkins v. District of Columbia Gov't, 108 F.3d 366, 371 (D.C. Cir. 1997), the Court will only conduct a 12(b)(6) analysis after determining whether the plaintiff's case survives the defendant's initial 12(b)(1) claim. See Green v. Stuyvesant, 505 F. Supp. 2d 176, 177 n.2 (D.D.C. 2007) ("[D]ue to the resolution of the defendants' Rule 12(b)(1) request, the Court does not need to address . . . alternative grounds for dismissal at this time."); Al-Owhali v.

Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) ("Although [the d]efendant states in his motion that he is seeking dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), dismissal, if warranted, could be entered solely on Rule 12(b)(1) grounds."). Accordingly, the Court will proceed by: (1) conducting a 12(b)(1) analysis to determine whether the plaintiff has established standing, and (2) conducting a 12(b)(6) analysis to determine whether the plaintiff has stated a claim upon which relief may be granted.

A. The Defendant's 12(b)(1) Motion to Dismiss

In seeking dismissal of the plaintiff's claim under Federal Rule of Civil Procedure 12(b)(1), the defendant asserts that the plaintiff "has not demonstrated that she suffered an actual and actionable injury that satisfies the standing requirements for subject matter jurisdiction." Def.'s Mem. at 5. The defendant argues that the plaintiff's allegations are "nothing more than mere conjecture and hypothetical injury[,]" id. at 6, as the plaintiff did not actually visit the defendant's hotel during her summer 2021 trip through Washington, D.C., and does not specifically intend to book a room there during her upcoming December 2022 trip, id. at 7. Furthermore, the defendant argues that the plaintiff has not "allege[d] any imminent injury as required to warrant injunctive relief." Def.'s Mem at 7.

In response, the plaintiff states that "[t]he facts set forth in [her Amended] Complaint . . . satisfy not only the [redacted] criteria" for establishing standing, "but also every negative decision in which a court imposed [an] intent-to-book criteria."[4] Pl.'s Opp'n at 4. The plaintiff argues that she has standing because she: (1) reviewed the defendant's ORS "for the purpose of ascertaining where she could stay during her [summer 2021] trip" through D.C.; (2) "traveled to . . . [D.C.] and needed a hotel to stay in;" (3) was "deprived . . . of the ability to book an accessible room in the same manner as other non-disabled persons;" (4) was "deprived of the information she required to make a meaningful choice in selecting a hotel in which to stay;" (5) has a definite intent to return to visit D.C. again in December 2022; and (6) will "again review [the d]efendant's ORS . . . for the purpose of ascertaining where she will be able to stay." See id.

Under Article III of the United States Constitution, federal courts are limited to adjudicating actual cases or controversies. See Honig v. Doe, 484 U.S. 305, 317 (1988). "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of . . . 'justiciability doctrines,' among which [is] standing[.]" Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)). Indeed, "[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy[,] . . . limit[ing] the category of litigants

[4] The plaintiff does not specify what cases she is referring to. Instead, after referencing "every other negative decision" that utilized an "intent-to-book" criteria, the plaintiff states "See, e.g.[,]" without citing any sources for the Court to consider. See Pl.'s Opp'n at 4. As such, the Court is forced to assume that the plaintiff was alluding to the string of cases where, because of her lack of intent to actually book a stay at the property in question, she was denied standing to sue. See [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Colo. [redacted]) ("[redacted] alleged an information injury but did not allege what, if any, 'downstream consequences' she will face from the loss of information. She did not . . . intend[] to use the ORS . . . to book an accessible room."); see also [redacted] v. [redacted], 22 F.4th [redacted], [redacted] (10th Cir. [redacted]); [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D. Colo. [redacted]); [redacted] v. [redacted], [redacted], [redacted] WL [redacted] (D. Colo. [redacted]).

empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citation omitted). To establish Article III standing, the plaintiff must show (1) "that [s]he has suffered an injury in fact[;] . . . (2) that a causal connection exists between the injury and the conduct at issue, such that the injury is fairly traceable to the challenged conduct; and (3) that it is likely, not merely speculative, that the injury will be redressed by a decision in favor of the plaintiff." Jefferson v. Stinson Morrison Heckler LLP, 249 F. Supp. 3d 76, 80 (D.D.C. 2017) (citing Lujan, 504 U.S. at 560–61).

The defendant's 12(b)(1) motion to dismiss only contests the injury in fact requirement for Article III standing. See generally Def.'s Mem. "To establish [an] injury in fact, a plaintiff must show that . . . [he or she] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, 578 U.S. at 339 (quoting Lujan, 504 U.S. at 560). Additionally, in an action seeking injunctive relief, "harm in the past . . . is not enough to establish[,] . . . in terms of standing, an injury in fact." Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334, 336 (D.C. Cir. 2003). "[A] party has standing . . . only if [he or she] alleges . . a real and immediate . . . threat of future injury." Nat. Res. Def. Council v. Pena, 147 F.3d 1012, 1022 (D.C. Cir. 1998).

"For an injury to be particularized, it must affect the plaintiff in a personal and individualized way." Spokeo, 578 U.S. at 339 (internal quotation marks omitted) (collecting cases). However, to constitute an injury in fact, that particularized injury must also be concrete. Id. For an injury to be "concrete," it must be "de facto" and actually exist. See id. at 340 (citing Black's Law Dictionary 479 (9th ed. 2009)). "'Concrete' is not, however, necessarily synonymous with 'tangible[,]' . . . [as] intangible injuries can nevertheless be concrete." Id.

In determining whether an intangible harm is concrete enough to constitute an injury in fact, "the judgement of Congress play[s an] important role[]." Id. "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" Id. at 341 (citing Lujan 504 U.S. at 578). For example, discriminatory treatment is often elevated in this way. See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (citing Allen, 468 U.S. at 757 n.22). Indeed, "[c]ourts must afford due respect to Congress'[s] decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." Id. at 2204 (citing Spokeo, 578 U.S. at 339). "But even though Congress may 'elevate' harms that 'exist' in the real world[,] . . . it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." Id. at 2205 (internal quotation marks omitted) (citation omitted).

However, "Article III standing requires a concrete injury even in the context of a statutory violation." Spokeo, 578 U.S. at 341. An "important difference exists between . . . a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and . . . a plaintiff's suffering concrete harm because of the defendant's violation of federal law." TransUnion, 141 S. Ct. at 2205. Therefore, an injury in law does not necessarily create injury in fact. See id. "Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation[.]" Id. (emphasis omitted).

In this case, the plaintiff alleges two intangible harms stemming from the defendant's statutory violation: first, an informational injury for being "deprived of the information she needed to make a meaningful choice in finding places in which to stay during her trip[,]" and second, a stigmatic injury because the defendant's violation made it "difficult to find hotels in which to stay, severely limited her options, and deprived her of full and equal access to the same goods and services enjoyed by non-disabled individuals[.]" Am. Compl. ¶ 13. The defendant contests the concreteness of these two injuries, and also challenges whether the plaintiff has "demonstrate[d] the 'imminent' future injury required for . . . injunctive relief[.]" Def.'s Mem at 6 (quotation omitted). As such, the Court will proceed with its analysis by determining: (1) whether the plaintiff's informational injury, as alleged, sufficiently constitutes an injury in fact, (2) whether the plaintiff's stigmatic injury, as alleged, sufficiently constitutes an injury in fact, and (3) because the Court ultimately concludes that the plaintiff has successfully alleged a stigmatic injury, whether the plaintiff has alleged the real and immediate threat of future injury needed to support standing for injunctive relief.

1. Informational Injury [Section Omitted]

2. Stigmatic Injury

Having established that the plaintiff's alleged informational injury is insufficient to confer standing, the Court will proceed with its analysis by addressing the plaintiff's contention that she suffered a stigmatic injury. See Am. Compl. ¶ 13. The plaintiff argues that the defendant, by omitting ADA-required accessibility information from its ORS, "contribute[d] to [the p]laintiff['s] sense of isolation and segregation[,] . . . deprive[d her] of the equality of opportunity offered to the general public[,]" id. ¶ 17, and caused her to experience "stigmatic injury and dignitary harm because it was difficult to find hotels in which to stay[,]" id. ¶ 13. In response, the defendant argues that the plaintiff could not have suffered such harms without actually intending to stay at the hotel, stating that the "[p]laintiff, somehow without even visiting [the hotel] or attempting to book a guest room, claims to have suffered 'frustration, increased difficulty, stigmatic injury, and dignitary harm.'" Def.'s Mem. at 5 (quotation omitted).

"'There is no doubt that dignitary harm is cognizable' because 'stigmatic injury is one of the most serious consequences of discrimination.'" [redacted], [redacted] WL [redacted], at [redacted] (quoting Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 833–34 (7th. Cir. 2019)). Indeed, "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 729 (1984); see also Brintley v. Aeroquip Credit Union, 936 F.3d 489, 493–94 (6th Cir. 2019) ("It[is] true that 'dignitary harm' and 'stigmatic injury' might give rise to standing in some settings.").

However, "not all dignitary harms are sufficiently concrete to serve as injuries in fact." Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649, 654 (4th Cir. 2019). "While 'statutes may define what injuries are legally cognizable—including intangible or previously unrecognized harms'—they 'cannot dispense with the injury requirement altogether.'" [redacted], [redacted] WL [redacted], at [redacted] (quoting [redacted], [redacted] F.3d at [redacted]).

Consequently, "an 'abstract stigmatic injury,' standing alone, [is] not cognizable." Penkoski v. Bowser, 486 F. Supp. 3d 219, 228 (D.D.C. 2020) (quoting Allen, 468 U.S. at 755). A "plaintiff[must] show that they have been 'personally denied equal treatment by the challenged discriminatory conduct,' not just that they feel stigmatized." Penkoski, 486 F. Supp. 3d at 228 (emphasis omitted) (quoting Allen, 468 U.S. at 755); but see [redacted] v. [redacted], [redacted] F.4th [redacted], [redacted] (11th Cir. [redacted]) ("[While] a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, . . . the emotional injury that results from [the] illegal discrimination is."). "The stigmatic injury thus requires the identification of some concrete interest with respect to which [a plaintiff is] personally subject to discriminatory treatment." Allen, 468 U.S. at 757 n.22.

Determining the level of concreteness required to support a stigmatic injury under Title III of the ADA "is, ultimately, an unsettled area of standing jurisprudence, with myriad decisions cutting both ways across the country." [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (D. Md. [redacted]). While existing case law does not indicate the precise point at which an interest becomes concrete enough to support a stigmatic injury in fact, "[i]n many cases the . . . question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Allen, 468 U.S. at 751–52. Accordingly, to determine whether the plaintiff has identified "some concrete interest" that was harmed by the defendant's alleged discrimination, the Court will proceed by comparing the facts of the current case to others that contain similar details and allegations.[5] See id. at 757 n.22.

First, the plaintiff alleges that she traveled to Washington, D.C., in summer 2021. See Am. Compl. ¶ 13. By visiting the city where the defendant's hotel was located, the plaintiff's allegations are already distinguishable from those in [redacted], where she failed to demonstrate "enough of a concrete interest" that was harmed by the defendant's ADA violation because she had not been to Washington, D.C., and "lack[ed] any allegations that she intend[ed] to visit [Washington, D.C.]" [redacted] WL [redacted], at [redacted]. Additionally, the plaintiff's allegations are distinguishable from those in [redacted] v. [redacted],[6] where she "failed to plead a concrete stigmatic or dignitary [injury]" even after alleging a visit to Eastern Colorado, the general region of the defendant's hotel. [redacted], [redacted] WL [redacted], at [redacted] (D. Colo. [redacted]). The U.S. District Court for the District of Colorado reasoned that "[Eastern Colorado] [wa]s a large swath of Colorado and could encompass numerous different places," and therefore, the plaintiff had "not alleged that she w[ould] or intend[ed] to travel to the location of the defendants' hotel[.]" Id. However, in the current case, the plaintiff traveled through "the specific [city] where [the d]efendants' hotel [was] located"—Washington, D.C. Cf. [redacted] WL

[5] Some of these cases were decided by district courts in other jurisdictions and are not binding on this Court. Nonetheless, due to their factual and legal similarities to the case at hand, as well as the shortage of analogous cases within the D.C. Circuit, this Court finds them instructive.

[6] [redacted], like the case currently before the Court, was stayed during the appeal of another of the plaintiff's suits, [redacted] v. [redacted], [redacted] F.4th [redacted], to the Tenth Circuit. See [redacted] WL [redacted], at [redacted]. When the Tenth Circuit affirmed the dismissal of [redacted] for lack of standing, the plaintiff motioned to file a supplemental complaint in [redacted], see id., just as she did when this Circuit affirmed the dismissal of [redacted], see generally Mot. File Suppl. Compl. However, in [redacted], the court denied her motion to file another complaint because her "proposed supplemental complaint [did] [not] remedy the defects in [her] original pleading." [redacted] WL [redacted], at [redacted].

[redacted], at [redacted] (holding that the plaintiff did not plead a concrete injury because she "d[id] not suggest an intent to visit the specific town where [the d]efendants' hotel [wa]s located").

Second, the plaintiff's intent to return to Washington, D.C., see Am. Compl. ¶ 15, is more concrete than it was in [redacted], [redacted] WL [redacted], at [redacted], and more geographically narrow than her intent to return to "Eastern Colorado" was in [redacted], [redacted] WL [redacted], at [redacted]. In [redacted], the plaintiff's "vague allegations" that she would visit Washington D.C. "as soon as the [COVID-19] crisis [was] over[,]" [redacted] WL [redacted], at [redacted], were too speculative and "undefined" to show standing, id. (citing [redacted], [redacted] WL [redacted], at [redacted]). In the current case, the plaintiff specifically alleges that "she will return to the [ORS] . . . and [Washington, D.C.,] . . . in December 2022," Am. Compl. ¶ 15, and provides a description of her plans to drive through the East Coast, see Statement ¶ 5. Moreover, unlike her plans in [redacted], the plaintiff intends to return to the "specific [city] where [the d]efendants' hotel is located[.]" Cf. [redacted] WL [redacted], at [redacted] (holding that the "[p]laintiff's did not allege that she would visit Byers, Colorado, the site of [the d]efendants' hotel," because she had only alleged that "she w[ould] travel to Eastern Colorado).

Third, unlike the scenario in [redacted] where she "visited the [defendant's ORS] to see if the [defendant] complied with the law, and nothing more[,]" [redacted] WL [redacted], at [redacted] (internal quotations omitted) (quoting [redacted], [redacted] F.3d at [redacted]), the plaintiff now alleges that she visited the defendant's ORS to "ascertain whether she would be able to stay at [the hotel,]" Am. Compl. ¶ 10. See also [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (W.D. Tex. [redacted]) (quoting Brintley v. Aeroquip Credit Union, 936 F.3d 489, 494 (6th Cir. 2019)) ("[M]erely browsing the web, without more, is[not] enough to satisfy Article III."), report and recommendation adopted sub nom., [redacted], [redacted] WL [redacted] (W.D. Tex. [redacted]), aff'd sub nom., [redacted] Fed. App'x. [redacted] (5th Cir. [redacted]); [redacted], [redacted] F.4th at [redacted] ("[The plaintiff] has not alleged that she has any interest in using the . . . [defendant's] ORS beyond bringing [a] lawsuit."). Indeed, the plaintiff was not simply "surfing various websites in her home to check for ADA compliance[,]" [redacted], [redacted] WL [redacted], at [redacted], but rather, "intend[ed] to use the information to evaluate places to stay for a future trip[,]" [redacted] v. [redacted], [redacted], [redacted] WL [redacted], at [redacted] (W.D. Wis. [redacted]).

As such, the plaintiff did not merely "feel stigmatized" by the defendant's alleged ADA violation. See Penkoski, 486 F. Supp. 3d at 228 (emphasis removed) (citation omitted). Although she did experience "frustration and humiliation[,]" she contends that the defendant's noncompliant ORS harmed her in a more concrete way by "depriv[ing her of] the same advantages, privileges, goods, services and benefits readily available to the general public." Am. Compl. ¶ 17. Moreover, the plaintiff alleges that the defendant's ADA violation impaired her ability to "ascertain[] whether or not she would be able to stay at the hotel during her [upcoming] trip[,]" and made it "difficult to find hotels in which to stay." Id. ¶ 10. Indeed, when she traveled through Washington, D.C., "and needed a hotel to stay in[,]" she claims that "[the d]efendant's discriminatory ORS operated as a barrier . . . and deprived [her] of the ability to book an accessible room in the same manner as . . . non-disabled persons." Pl.'s Opp'n at 4. The plaintiff also states that it was "extremely difficult to find hotels with accessible rooms" and that "there were occasions when [she] had to sleep in [her] car." Statement ¶ 4. Thus, the

plaintiff's alleged stigmatic injury is not an "abstract" one that "stand[s] alone[.]" Penkoski, 486 F. Supp. 3d at 228 (quoting Allen, 468 U.S. at 755). Rather, it is accompanied by allegations of real-world harm to her ability to assess hotel options and book accessible rooms. Cf. [redacted], [redacted] WL [redacted], at [redacted] (conferring standing to a plaintiff as a result of the dignitary harm that stemmed from being unable to "evaluate places to stay for a future trip").

Therefore, the Court concludes that the plaintiff's inability to "ascertain[] whether or not she would be able to stay at the [defendant's] hotel[,]" Am. Compl. ¶ 10, combined with her visit to the specific city where the defendant's hotel was located, see [redacted], [redacted] WL [redacted]; [redacted], [redacted] WL [redacted], as well as her need to stay at a hotel in that specific city, see Am. Compl. ¶ 10, collectively constitute "some concrete interest" that was harmed by the defendant's ADA violation,[7] Allen, 468 U.S. at 757 n.22. The plaintiff's summer 2021 trip through Washington, D.C., created a particularized "connection between [the] plaintiff and [the] defendant . . . [that] separate[d] her from the general population visiting the [ORS,]" and as a result, the plaintiff suffered a concrete and particularized stigmatic injury in fact. [redacted], [redacted] WL [redacted], at [redacted]. Accordingly, the Court concludes that the "concrete interest" needed to support a stigmatic injury under the ADA does not necessarily require an intent to book. Allen, 468 U.S. at 757 n.22. As such, the plaintiff has established a stigmatic injury in fact.

3. Future Injury [Section Omitted]

B. The Defendant's 12(b)(6) Motion to Dismiss [Section Omitted]

IV. CONCLUSION

For the foregoing reasons, the Court concludes that it must grant the defendant's motion to dismiss to the extent that it seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) but deny it in all other respects.

SO ORDERED this ___ day of ___, 2022.[8]

REGGIE B. WALTON
United States District Judge

[7] Admittedly, the plaintiff did not specifically visit the defendant's hotel or intend to book an accessible room there. See Def.'s Mem. at 5. However, the defendant's ADA violation "served as a barrier to this very event[,]" Pl.'s Opp'n at 2–3, preventing the plaintiff from ascertaining "whether the . . . hotel [was] accessible" enough for her specific needs in the first place. Am. Compl. ¶ 17. Moreover, the ADA Regulation specifically requires that hotel owners "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs[.]" 28 C.F.R. § 36.302(e)(ii). Therefore, the Court concludes that an intent to book is not necessary for establishing a stigmatic injury.

[8] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

DANIEL W. XU
1084 Mill Field Ct., Great Falls, VA 22066 | 703-606-3450 | daniel.xu@emory.edu

WRITING SAMPLE

This journal comment was researched and written during the first half of my 2L year. It was selected for publication in Volume 73 of the *Emory Law Journal* (forthcoming 2024). This piece is my original work and writing, but reflects substantive legal feedback from my faculty advisor, structural and topical feedback from my Notes and Comments Editor, and general feedback from another second-year student on the *Emory Law Journal*. This draft has not been submitted to the editorial board for line-edits, substantiation, or cite-checks. It has been condensed for use as a writing sample. As such, some internal cross-references may be inconsistent. The full, 62-page (double-spaced) version is available upon request.

Written Fall 2022 & Early Spring 2023

Federalism and Police Accountability: Codifying Criminal Liability for the Reckless Deprivation of State Constitutional Rights

ABSTRACT

The absence of police accountability has never been more visible. High profile police brutality has resulted in high profile disappointment, where culpable officers walk away undisciplined, unprosecuted, and undeterred from committing the same atrocity again. Such impunity has exposed longstanding deficiencies within our two-tiered and multipolar system of civil rights enforcement. Chief among these failures is 18 U.S.C. § 242, an oft-overlooked statute that imposes criminal liability upon officers who "willfully" deprive others of any federal constitutional right. The statute's threshold requirement of willful intent has confused courts and discouraged enforcement, resulting in the heavy underdeterrence of civil rights violations. Federal legislative efforts to reform Section 242 have been unsuccessful, and the Supreme Court seems unwilling to revisit its authoritative—but perhaps unworkable—interpretation of the statute in Screws v. United States. *State equivalents fare no better, as they utilize comparable standards that present judges, juries, and prosecutors with many of the same roadblocks to accountability.*

To remedy the impotence of Section 242 and its sub-federal offshoots, this Comment argues that state legislatures should impose criminal liability upon law enforcement agents who "recklessly" deprive others of their state constitutional rights. By lowering the mens rea required for liability and incorporating the expansive protections of state constitutional jurisprudence, this proposal criminalizes a much wider range of police misconduct than is currently prohibited. However, this change would still protect officers who reasonably adhere to the law, allowing those individuals to do their jobs without the fear of unwarranted reprisal. A recklessness standard would also allow local judges to escape the Supreme Court's amorphous definition of willfulness in Screws*, which was frequently invoked by state courts seeking to interpret Section 242's state-level analogues. Although the expansion of criminal liability comes with many downsides, it is much needed in the realm of police misconduct, where violations routinely occur without any measure of accountability at all. For these reasons, this Comment asserts that states need a broader, more predictable, and more civilian-friendly criminal deprivation of rights statute to deter unconstitutional police behavior.*

TABLE OF CONTENTS **[Omitted]**

INTRODUCTION

Amadou Diallo stood in the doorway of his Bronx apartment building, unwinding after a long day of work.[1] He made his living as a street vendor, selling clothes and videotapes in Manhattan for twelve hours a day, six or seven days each week.[2] Amadou had just emigrated from the Guinean village of Lelouma, and had only lived in New York City for two-and-a-half years.[3] He was a devout Muslim, did not smoke or drink, and had no criminal record.[4]

And yet, without being able to see him clearly enough to even determine his race, four police officers determined that Amadou—by "slinking" on the stoop of his home—was acting suspiciously,

[1] Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting are Acquitted of All Charges*, N.Y. TIMES (February 26, 2000), https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html.
[2] *Id.*
[3] Michael Cooper, *Officer in Bronx Fired 41 Shots, and an Unarmed Man is Killed*, N.Y. TIMES (February 5, 1999), https://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html.
[4] *Id.*

and fit the description of a rapist from a year prior.[5] They never contemplated that Amadou might have lived in the building, or considered that he had a legitimate reason for being there.[6] When the four plain-clothed officers approached him with their guns drawn, Amadou retreated into the hallway and, for reasons unknown, reached his hand into his pocket to retrieve his wallet.[7] His actions proved deadly, and his fear became a capital offense.[8] The officers, thinking that the wallet was a gun, fired forty-one shots at Amadou, striking him nineteen times and killing him on the spot.[9] When he died, Amadou was unarmed, had committed no crime, and had not performed any act of aggression.[10]

Nonetheless, the Department of Justice concluded that it could not bring civil rights charges against the four officers.[11] Even on these facts, it was too difficult for federal prosecutors to establish a prima facie case under 18 U.S.C. § 242, which imposes criminal liability upon state officials who "willfully" deprive others of their federally protected rights.[12] Indeed, to secure a Section 242 conviction against Amadou's killers, the Department of Justice needed to prove that the officers acted with the specific intent of depriving Amadou of an explicit constitutional right.[13] Here, it was his right to be free from unreasonable force, or his right to due process before being deprived of life.[14] This mens rea requirement—willfulness—is exceedingly difficult to meet,[15] and has consistently frustrated federal efforts to hold local police officers accountable for their misconduct,[16] even when those

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[5] Fritsch, *supra* note 1.

[6] Fritsch, *supra* note 1.

[7] Fritsch, *supra* note 1 ("[The state] suggested that [Amadou] may simply have been reaching for his wallet to hand it over to what he thought was a gang of robbers . . . [or] to show the officers his identification.").

[8] Cooper, *supra* note 3.

[9] Cooper, *supra* note 3.

[10] *See* Press Release, Department of Justice, Statement by Acting Attorney General Eric H. Holder Jr. Regarding the Closing of the Amadou Diallo Case (Jan. 31, 2001), https://www.justice.gov/archive/opa/pr/2001/January/046dag.htm [hereinafter Diallo Press Release]. *See generally* Christian Red, *Years Before Black Lives Matter, 41 Shots Killed Him*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/nyregion/amadou-diallo-mother-eric-garner.html ("The night before her son's death, [Amadou's mother] said she spoke to him by phone. 'Mom, I'm going to college!' she recalled him announcing.").

[11] Diallo Press Release, *supra* note 10.

[12] *See* Diallo Press Release, *supra* note 10 ("[The Department of Justice] could not prove beyond a reasonable doubt that the officers willfully deprived Mr. Diallo of his constitutional right to be free from the use of unreasonable force[.]"). *See generally* Michael J. Pastor, *A Tragedy and a Crime?: Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations*, 6 N.Y.U J. LEGIS. & PUB. POL'Y 171 (2003) (discussing whether federal prosecutors could have brought civil rights charges against Amadou Diallo's killers).

[13] *See* Diallo Press Release, *supra* note 10.

[14] *See* Diallo Press Release, *supra* note 10.

[15] A criminal statute's mens rea is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant has when committing a crime." Mens Rea, BLACK'S LAW DICTIONARY (11th ed. 2019).

[16] *See, e.g.,* Press Release, Department of Justice, Justice Department Announces Closing of Investigation into 2014 Officer Involved in Shooting in Cleveland, Ohio (Jan. 31, 2001) ("[T]he evidence is insufficient to prove . . . that Officer Joehman willfully violated Tamir Rice's constitutional rights[.]"), https://www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland; Memorandum, Department of Justice, Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Office Darren Wilson (Mar. 4, 2015), at 11 ("[Officer] Wilson did not willfully violate [Michael] Brown's Constitutional right to be free from unreasonable force[.]"), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf; Letter from Sen. Mark R. Warner, Sen. Tim Kaine, Rep. Donald S. Beyer Jr., Rep Eleanor Holmes Norton, Rep. Jennifer Wexton, Rep. Gerald E. Connolly & Rep. Raul M. Grijalva to Attorney Gen. Merrick Garland (May 4, 2022) ("[The] Civil Rights Division [stated] that . . . [it] would not pursue a federal indictment against the officers under 18 U.S.C. § 242."), https://beyer.house.gov/uploadedfiles/letter_to_ag_re__bijan_ghaisar.pdf.

officers are acting in visibly bad faith.[17] Despite thousands of complaints being filed with the Department of Justice each year, Section 242 prosecutions remain extremely rare,[18] due in large part to the statute's steep mens rea standard.[19]

While there have been some attempts to reform Section 242 by lowering its mens rea requirement,[20] all have fallen short.[21] Such stagnation is neither unexpected nor unprecedented. The Supreme Court's unwillingness to reconsider its civil rights enforcement doctrines,[22] coupled with Congressional division and gridlock, has made it difficult to implement meaningful federal reform.[23] Thus, many activists have shifted their attention to the state level,[24] and numerous academics have begun exploring the role of local governments in protecting civil rights.[25] After all, state constitutions provide "independent source[s] of rights" from the U.S. Constitution,[26] and our nation's history shows a long tradition of state authority over law enforcement misconduct.[27]

Interestingly, while many states have built upon federal law by expanding civil causes of action against police officers who deprive individuals of their state constitutional rights,[28] few have codified criminal liability for the same injustice.[29] As such, this Comment argues that states should enact

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[17] *See* Paul J. Watford, *Hallows Lecture: Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 482 (2014); Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2184 (1993).

[18] *See* Steven Puro, *New Approaches to Ensuring the Legitimacy of Police Conduct: Federal Responsibility for Police Accountability Though Criminal Prosecution*, 22 ST. LOUIS PUB. L. REV. 95 (2003) (finding that out of an average of 8,437 yearly complaints from 1985–2001, the number of Section 242 defendants ranged from a low of 22 in 1989 to a high of 97 in 2001); Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006*, 34 CRIM. JUST. REV. 196 (2009) ("[T]he data show that [Section] 242 prosecutions are a relatively rare event.").

[19] *See supra* note 16.

[20] *See, e.g.,* Eric Garner Excessive Use of Force Prevention Act of 2019, H.R. 4408, 116th Congress (Sept. 9, 2019) (proposing a provision that explicitly condemns "the application of any pressure to the throat or windpipe"); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congress (June 8, 2020) (proposing changing Section 242's mens rea requirement from "willfully" to "knowingly or with reckless disregard"); Justice in Policing Act of 2020, S. 3912 (June 8, 2020) (same); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (Feb. 24, 2021) (same).

[21] *See* Felicia Sonmez & Mike DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests over Killing of Black Americans*, WASH. POST (Sept. 22, 2021) https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34b_ story.html.

[22] *See, e.g.,* Andrew Chung, *U.S. Supreme Court Rebuffs Challenge to Police Qualified Immunity Defense*, REUTERS (Oct. 11, 2021) https://www.reuters.com/legal/us-supreme-court-rebuffs-challenge-police-qualified-immunity-defense-2022-10-11/ (discussing how the Supreme Court "declined to take up a challenge to . . . qualified immunity"); Robert Barnes & Ann E. Marimow, *Supreme Court Refuses to Reconsider Immunity that Shields Police Accused of Brutality*, WASH. POST (June 15, 2020) https://www.washingtonpost.com/politics/courts_law/supreme-court-refuses-to-reconsider-immunity-that-shields-police-accused-of-brutality/2020/06/15/1cfc444c-ae7f-11ea-8f56-63f38c990077_story.html (same).

[23] *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 740 (2021).

[24] *See* Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES, (June 21, 2020) https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=75f4e06d378a.

[25] *See* Reinert, Schwartz & Pfander, *supra* note 23; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16–21 (2018) [hereinafter SUTTON, 51 IMPERFECT SOLUTIONS]; ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 14 (2009).

[26] SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 25, at 19–20.

[27] *See* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WISC. L. REV. 789, 802–05 (2000); Adam Harris Kurland, *The Enduring Virtues of Deferential Federalism: The Federal Government's Proper Role in Prosecuting Law Enforcement Officers for Civil Rights Offenses*, 70 HASTINGS L. J. 771, 779–82 (2019).

[28] *See* Reinert, Schwartz & Pfander, *supra* note 23, at 757–68.

[29] *See infra*, Section II.

measures that emulate Section 242 by imposing criminal sanctions against law enforcement agents who deprive individuals of their state constitutional rights, but improve upon Section 242's deficiencies by lowering the mens rea requirement for such liability from willfulness to recklessness. Such legislation would increase the level of accountability that officers face for their misconduct, counteract the shortcomings of federal civil rights enforcement, and hopefully, serve as an effective deterrent to unlawful police behavior.

[Remainder of Introduction omitted]

I. THE EVOLUTION OF TITLE 18 U.S.C. § 242 AND "WILLFULNESS"

Section 242 imposes criminal liability upon individuals acting "under color of any law" who "willfully" deprive someone else of a constitutionally protected right.[30] Such cases typically involve law enforcement officers who have been accused of robbery, theft, excessive force, or sexual assault.[31] Section 242 prosecutions are rare, occurring only a few dozen times each year.[32] Nonetheless, a string of widely reported police killings has sparked heightened interest in the federal government's ability to punish and deter civil rights crimes committed by local law enforcement agents.[33] As one of the few federal mechanisms for holding local police officers criminally accountable for their misconduct, Section 242 was thrust center-stage.[34] The statute—a remnant from Reconstruction-era America[35]—received widespread criticism for its ineffectiveness, which academics and policymakers blamed in large part on its steep mens rea requirement.[36] This Part discusses those critiques, and recounts the doctrinal development and contemporary shortcomings of Section 242. It begins in Section A with

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[30] 18 U.S.C. § 242. In full, Section 242 states that:

> [w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Id. While the statute has been amended several times throughout history, "its core prohibition has changed little since the nineteenth century." CONGRESSIONAL RESEARCH SERVICE LSB10495, Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242 (2020).

[31] *See* Johnson & Bridgmon, *supra* note 18, at 205.

[32] *See* Johnson & Bridgmon, *supra* note 18, at 205.

[33] *See* CONGRESSIONAL RESEARCH SERVICE LSB10495, *supra* note 30; Lawrence, *supra* note 17; Hernandez Stroud, *How Congress Can Give Teeth to The Federal Law on Police Accountability*, BRENNAN CENTER FOR JUSTICE (May 14, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-congress-can-give-teeth-federal-law-police-accountability.

[34] *See* CONGRESSIONAL RESEARCH SERVICE LSB10495, *supra* note 30. While this recent wave of high profile police killings has sparked renewed interest in the issue of police accountability, it is important to note that "the need for more robust oversight . . . is as old as policing itself." Reinert, Schwartz & Pfander, *supra* note 23, at 738 (citing Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 7–10 (2001)).

[35] Section 242's specific provisions originate in the Civil Rights Act of 1866, which was passed to combat the widespread refusal of Southern officials to acknowledge newly ratified Constitutional Amendments. *See* Watford, *supra* note 17, at 471–72. By empowering federal officials to prosecute state law enforcement officers who failed to respect federally protected rights, Section 242 represented a significant incursion into "one of the most sensitive areas of a State's internal affairs: the conduct of its police." *Id.* at 485. In its original form, Section 242 did not require proof of a defendant's mens rea for conviction. *See* Jacobi, *supra* note 27, at 807. The word "willfully" was added to Section 242 in 1909. *See id.*

[36] *See* Lawrence, *supra* note 17; Stroud, *supra* note 33.

Screws v. United States,[37] the leading Supreme Court decision on Section 242's constitutionality and willfulness requirement. Section B proceeds by analyzing subsequent interpretations of Section 242, where lower courts have agonized over the difficult and confusing framework established in *Screws*.[38] Finally, Section C examines the negative impact that *Screws* and its progeny have had on civil rights enforcement, concluding that reform is badly needed to bolster those deficiencies.

A. *The* Screws *Case: A Pyrrhic Victory for Civil Rights Enforcement*

With the creation of the Department of Justice's Civil Rights Section in 1939,[39] Attorney General Frank Murphy sought to reinvigorate the federal government's role in protecting fundamental rights—identifying Section 242 as a potential means for achieving that goal.[40] However, the statute was relatively untested, and its scope was generally unclear.[41] As such, the newly formed Civil Rights Section chose to test the bounds of Section 242 with the "shocking and revolting" facts of *Screws*, presenting the Supreme Court with a poignant narrative of racially-motivated police violence to provoke answers about Section 242's constitutionality and application.[42]

Claude Screws, the Defendant-Petitioner, was the Sheriff of Baker County, Georgia.[43] He had known the victim, Robert Hall, for quite some time—viewing him as a leader in the local African American community.[44] Their tense relationship erupted in 1943 after Hall took Screws to court, alleging a wrongful seizure of his property.[45] Angered by this audacity, Screws vowed to "get" Robert Hall.[46] The Sherriff made good of his promise by issuing an arrest warrant "of only doubtful legality[,]" accusing Hall of stealing a tire.[47] Executing this warrant, officers invaded Hall's home, bound him, and forced him to the town square where the Sherriff was waiting.[48] There, Screws and his officers assaulted Hall for nearly thirty minutes, beating him with their fists and a two-pound metal blackjack.[49] When they were finished, Hall laid motionless in the dirt.[50] Blood covered the ground, painting a trail across town as the officers dragged Hall "feet first" into jail.[51] When an ambulance was called, it was too late.[52] Hall never regained consciousness, and died within an hour of reaching the hospital.[53]

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[37] 325 U.S. 91 (1945).
[38] *See* Paul Savoy, *Reopening Ferguson and Rethinking Civil Rights Prosecutions*, 41 N.Y.U. REV. L. & SOC. CHANGE 277, 301 (2017); *see also United States v. Johnstone*, 107 F.3d 200, 208 (3d Cir. 1997) ("As is evident from the text, and has oft been noted, *Screws* is not a model of clarity.") (citation omitted).
[39] The Civil Rights Section is now known as the Department of Justice's Civil Rights Division. *See* Watford, *supra* note 17, at 476.
[40] *See* Watford, *supra* note 17, at 470.
[41] *See* Watford, *supra* note 17, at 472–74 (discussing how the Supreme Court's dismantling of other Reconstruction-era civil rights measures cast significant doubt upon the validity of Section 242).
[42] 325 U.S. 91, 92 (1945); *see also* Watford, *supra* note 17, at 475–76.
[43] *Screws*, 325 U.S. at 92.
[44] *See* Watford, *supra* note 17, at 467 ("Screws described Hall as a 'biggety negro,' someone others within the local black community looked to as a leader[.]").
[45] *See* Watford, *supra* note 17, at 467.
[46] *Screws*, 325 U.S. at 112 (1945) (Rutledge, J., concurring); *see also* Watford, *supra* note 17, at 469.
[47] *Screws,* 325 U.S. at 112 (Rutledge, J., concurring).
[48] *See* Watford, *supra* note 17, at 469.
[49] *See* Watford, *supra* note 17, at 469.
[50] *See* Watford, *supra* note 17, at 469.
[51] *Screws*, 325 U.S. at 93.
[52] *Id.*
[53] *Id.*

When Georgia officials refused to prosecute the crime, the Department of Justice stepped in, indicting Screws and his officers under Section 242.[54] Federal prosecutors argued that the local officers had willfully deprived Hall of his constitutional right to life, which could only be stripped through due process of law.[55] A jury found Screws guilty, and the Fifth Circuit affirmed the verdict on appeal.[56]

The case was granted certiorari by the Supreme Court in 1944, and Screws sought to have his conviction reversed, arguing that Section 242's core prohibition—willfully depriving someone of a constitutional right—was unconstitutionally vague.[57] Screws contended that Section 242 lacked an ascertainable standard of guilt because "willfulness" could mean many things, and that the statute's broad incorporation of constitutional law was too fluid to give defendants proper notice.[58]

Sympathetic towards Screws' argument, the Court acknowledged the "constitutional vice" presented by Section 242.[59] The statute's lack of specificity threatened to leave officers stranded in a "vast uncharted sea" where they might suffer the injustice of being placed on trial, without warning, for an undefined offense.[60] Still, the Court sought to preserve Section 242, as it was one of the few protective mechanisms for the "great rights" which the U.S. Constitution was meant to secure.[61] Justice William O. Douglas, writing for the plurality, emphasized the statute's importance—reasoning that the Court had an obligation to read Section 242 in a way that would support its constitutionality.[62]

As such, the Court interpreted Section 242 narrowly, attempting to resolve the statute's problems by clarifying its willfulness standard.[63] Willfulness, the plurality explained, requires "something more" than "bad purpose or evil intent[.]"[64] An officer must have acted with the "specific intent to deprive a person of a federal right made definite by decision or other rule of law[.]"[65] The Court reasoned that this specific intent requirement would cure Section 242 of its vagueness and notice issues, as officers acting with such intent would be inherently aware of their unconstitutional conduct.[66] The Court also hoped that such an interpretation would punish culpable officers without "becom[ing] a trap for law enforcement agencies acting in good faith."[67]

Yet, in a seemingly contradictory clarification,[68] the Court stated that officers need not be thinking in explicitly constitutional terms, and could satisfy the willfulness standard by acting "in open

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[54] Watford, *supra* note 17, at 469.
[55] Watford, *supra* note 17, at 469.
[56] *Screws*, 325 U.S. at 94.
[57] *Id.* at 96, 103–04. Screws also raised a litany of federalism concerns, arguing, among other things, that he was not acting "under color of law" for Section 242 purposes because he was acting under state and not federal authority. *Id.* at 108–12. The Court rejected this argument, concluding that one acts "'under color of law' when they act under 'pretense' of law[,]" no matter the origin of the authority and even if they are violating that law. *Id.*
[58] *Id.* at 96, 103–04.
[59] *Id.* at 101.
[60] *Id.* at 98, 100, 102. The Court compared an expansive interpretation of Section 242 to the "Caligula[n practice of] publish[ing] the law . . . in a very small hand . . . posted up in a corner . . . [where] no one could make a copy[.]" *Id.* at 96.
[61] *Id.* at 100.
[62] *Id.*
[63] *Id.* at 102–03.
[64] *Id.* at 103.
[65] *Id.* The Court also describes willfulness as "a purpose to deprive a person of a *specific* constitutional right." *Id.* at 101 (emphasis added).
[66] *See id.* at 103–04.
[67] *Id.* at 104.
[68] *See generally supra* note 38 (previewing the confusion surrounding *Screws*).

defiance or in reckless disregard of a constitutional requirement."[69] These facially inconsistent mandates—that an officer must have specifically intended to violate a constitutional right, but need not have been thinking in constitutional terms—provide a slippery definition of specific intent.[70] Furthermore, the plurality's instruction that willfulness encompassed the "open defiance" or "reckless disregard" of a definite constitutional right seemed to undercut the Court's emphasis of a specific intent requirement,[71] as "recklessness" is often used to describe an alternative, lower mens rea standard.[72] Ultimately, amidst this ambiguity and contradiction, the only certainty provided by Justice Douglas was that Section 242 required officers to have deprived a constitutional right with "something more" than "bad purpose or evil intent[.]"[73]

Consequently, the Court vacated the convictions and instructed that another trial be held in light of its decision.[74] Under the new *Screws* willfulness standard, which federal officials called "very damaging" to their case, the Sherriff and his officers were all acquitted.[75] The Court's ruling in *Screws* was a major setback for federal civil rights enforcement.[76] Although some onlookers saw Section 242's survival as a triumph,[77] most agreed that the victory was pyrrhic at best—making "more prosecutions possible [but] fewer convictions probable[.]"[78] Section 242's preservation came at the expense of its effectiveness, evidenced by the immediate acquittal of a "premeditated, racially motivated, and horrifically brutal murder" in *Screws*.[79] The Sherriff never faced accountability for his actions, and to compound the injustice, went on to win a seat in the Georgia State Senate.[80]

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[69] *Screws*, 325 U.S. at 106–07.

[70] *See* Edward F. Malone, *Legacy of the Reconstruction: The Vagueness of the Criminal Civil Rights Statutes*, 38 UCLA L. REV. 163, 199 (1990) ("The problem the courts face is Justice Douglas's opinion, which is nearly as vague as the statute it struggles to clarify."); Savoy, *supra* note 38, at 299 ("[I]f the officer is not thinking in constitutional terms, how can he have a purpose to deprive a person of a specific constitutional right?"); Watford, *supra* note 17, at 482 ("It's never been entirely clear how the government is supposed to . . . prov[e willfulness,] . . . and judges . . . have struggled to formulate comprehensible jury instructions explaining it.").

[71] The plurality noted that a constitutional right is made definite by the express terms of the Constitution, the plain language of a federal law, or the decision of a federal court. *Screws*, 325 U.S. at 107.

[72] *See* Lawrence, *supra* note 17, at 2185 n. 327 (suggesting that the plurality's description of willfulness correlated, at times, more closely with the concept of negligence than specific intent). *See generally* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 169–72 (8th ed. 2019) (describing the different tiers of mental culpability).

[73] *Screws*, 325 U.S. at 101, 103.

[74] *Id.* at 113. Justice Murphy, who was the Attorney General during the creation of the Department of Justice's Civil Rights Section, dissented vehemently. *Id.* at 134–38 (Murphy, J., dissenting). He saw it as "unnecessary to send this case back for a further trial on the assumption that the jury was not charged on the matter of willfulness . . . an issue that was not raised below or before us." *Id.* at 137. Murphy thought Screws' actions were so shocking and unjustifiable that to reverse the conviction would be shameful. *See id.* He argued that the Court's assignment in that given moment was affording justice to Robert Hall, not creating a willfulness standard for all future cases. *Id.* Justices Roberts, Frankfurter, and Jackson wrote a separate dissent, taking a different stance from Justice Murphy. *Id.* at 138–61 (Roberts, Frankfurter & Jackson, JJ., dissenting). They objected to the preservation of Section 242 altogether. *Id.* at 138–61. They argued that the plurality's solution fixed neither the vagueness surrounding the willfulness standard nor the definitiveness of various constitutional rights. *Id.* at 186. Thus, they concluded that Section 242 remained "void for vagueness." *Id.*

[75] Watford, *supra* note 17, at 482.

[76] *See* Malone, *supra* note 70; Lawrence, *supra* note 17.

[77] For example, Judge Paul Watford states that "[t]he most important legacy of *Screws* is that Section 242 survived[,]" calling the preservation of federal prosecutorial power over state officials a victory in and of itself. Watford, *supra* note 17, at 482–83; *see also* Jacobi, *supra* note 27, at 808–10 (2000) ("[T]he decision . . . represents a distinct victory for the cause of civil liberty, although the majority position is a compromise one."). Still, even Judge Watford acknowledges that the legacy of *Screws* was "at best a mixed one." Watford, *supra* note 17, at 481.

[78] Watford, *supra* note 17, at 482 (quotation omitted).

[79] Savoy, *supra* note 38, at 299.

[80] Watford, *supra* note 17, at 482 (citation omitted).

B. *Subsequent Interpretations: Delineating Specific Intent*

Despite Justice Douglas' best efforts to provide a concrete standard, lower courts have struggled immensely with the meaning of willfulness in Section 242 cases.[81] While the *Screws* willfulness standard is widely characterized as one of specific intent,[82] this description is only mildly helpful, as specific intent "is one of common law's most elusive concepts."[83] The confusion surrounding this requirement can be seen in the patchwork of approaches taken by different jurisdictions.[84] At the center of this uncertainty is one key question: if an officer can specifically intend to deprive their victim of a constitutional right without thinking in explicitly constitutional terms, what exactly must they have been thinking to satisfy the requisite mens rea of willfulness?[85] Different circuits have articulated inconsistent, perhaps incompatible,[86] answers to this inquiry.[87] One approach finds that an officer's knowing violation of any ordinary law, if it results in the unintended deprivation of a constitutional right, is sufficient to demonstrate willfulness. The other approach describes willfulness as the intent to deprive another of an *interest* protected by a clearly defined constitutional right—whether or not the offending officer knew they were violating a law, or was aware of the constitutional provision at issue. These competing views will be examined in Subsections 1 and 2, respectively. In an attempt to reconcile these standards, Subsection 3 discusses how these seemingly incompatible interpretations, when applied in the real world, may not be so different after all.

1. *Willfulness as a Knowing Violation of the Law*

Some circuits have reconciled the "two superficially conflicting mandates" of *Screws* by focusing on Justice Douglas' statement that willfulness includes the reckless disregard of a constitutional right.[88] These courts reasoned that the intentional disobedience of an ordinary law or statute—even if the officer was unaware of the constitutional implications of their infraction—would satisfy such a standard.[89] Following this logic, deprivations of another's rights are committed willfully if they result from a knowingly unlawful act, as the underlying legal infraction shows "something more" than just "bad purpose or evil intent[.]"[90]

For example, in *United States v. Dise*, the Third Circuit upheld a jury charge which instructed that a criminal deprivation of rights was performed willfully if the defendant, Hastings Dise, knew that

[81] *See* Malone, *supra* note 70, at 193 ("*Screws* left it to lower courts to determine where, along the spectrum of specificity that lies between bad purpose and conscious recognition[,] . . . the [mens rea] of a [Section 242] violator must be fixed.").
[82] Watford, *supra* note 17, at 482.
[83] Malone, *supra* note 70, at 193.
[84] Malone, *supra* note 70, at 191–215.
[85] Malone, *supra* note 70, at 191–215.
[86] *Compare* Malone, *supra* note 70, at 193, 194 n. 113 (describing the interpretations of some circuits as "suspiciously similar" to a construction that was implicitly rejected by *Screws*) *with* United States v. Proano, 912 F.3d 431, 443 n. 6 (7th Cir. 2019) ("[Although o]ther circuit courts have described willfulness in the § 242 context somewhat differently . . . [t]hose definitions are not so dissimilar . . . to cast doubt on our own conclusion[.]").
[87] Malone, *supra* note 70, at 191–215.
[88] United States v. Dise, 763 F.2d 586, 592 (3rd Cir. 1985).
[89] *Id.* at 592–93; United States v. Sipe, 388 F.3d 471, 479–80 (5th Cir. 2004) ("An act is done willfully if it is done . . . with the specific intent to do something the law forbids.") (internal quotation marks omitted) (quotation omitted); *Proano*, 912 F.3d at 443 (stating that a defendant must know they were doing as a statute forbids).
[90] *Screws*, 325 U.S. at 101, 103.

his use of force was beyond what was permitted by law.[91] Dise was an aide at a "state institution for the mentally retarded[,]" and had been convicted for willfully depriving several residents of their constitutional right to be free from excessive force.[92] Although the law allowed aides to use force if it was necessary for assuring safety, the defendant "frequently punched, kicked, kneed, or shoved [residents] for no authorized reason . . . [with] an intent to humiliate and taunt [them.]"[93] Dise insisted that he struck these individuals without any intention of depriving them of their constitutional rights, and was acting only to preserve order.[94]

Even so, since *Screws* stated that Section 242 defendants need not be thinking in constitutional terms, the Third Circuit reasoned that if Dise had "acted in reckless disregard of the law as he understood it[,]" then any ensuing deprivation of rights would have been performed willfully.[95] Thus, defendants could be found guilty even if they did not explicitly intend to violate the Constitution, and even if they failed to recognize that their acts implicated any constitutional concepts at all.[96] Consequently, the Third Circuit upheld the lower court's decision, agreeing that Dise's intent to break the law could be reasonably inferred from the fact that he looked in both directions before hitting residents, that aides consistently received training on lawful levels of force, and that he bragged of never being "caught" for his actions.[97] Based on these facts, Dise's knowing violation of the law amounted to the willful deprivation of a constitutional right, even though he was not thinking in explicitly constitutional terms.[98]

While this approach provides a much-needed degree of specificity to the *Screws* standard, it does have one major shortcoming: a defendant must have knowingly violated a law other than Section 242, conditioning the willful deprivation of a constitutional right upon the presence of some other unlawfulness.[99] If Section 242 is meant to be a protective mechanism for the "great rights" guaranteed by the U.S. Constitution,[100] then a separate statutory infraction should not be a precondition for utilizing Section 242 itself.[101] Thus, in situations where there is no law other than the Constitution prohibiting a defendant's actions, or situations where defendants were subjectively unaware of an applicable law, this notion of willfulness is left "without a foundation."[102]

2. *Willfulness Despite Unknowingly Violating the Law*

Conscious of this pitfall, other circuits have adopted a different view, defining willfulness under Section 242 as the intent to invade an *interest* that is protected by the United States Constitution. Unlike the *Dise* approach, which defined willfulness as the consequence of a knowingly unlawful deed, these circuits have explicitly declared that there is no requirement under Section 242 that a defendant

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[91] *See Dise*, 763 F.2d at 587–89 (instructing the jury that "The Government has to prove . . . that the defendant used excessive, unreasonable and unnecessary force . . . and at the time he did it, he knew he was using excessive, unreasonable and unnecessary force beyond that which was permitted to him under the law.").
[92] *Id.*
[93] *Id.* at 588.
[94] *Id.* at 592.
[95] *Id.* at 591–92.
[96] *Id.* at 587–89.
[97] *Id.* at 588.
[98] *Id.* at 587.
[99] Malone, *supra* note 70, at 211.
[100] *Screws*, 325 U.S. at 98–100.
[101] Malone, *supra* note 70, at 211.
[102] Malone, *supra* note 70, at 211.

recognize the unlawfulness of their actions.[103] Rather, by conditioning willfulness upon the intent to invade a broadly protected federal interest, like that of preserving due process or promoting fair elections,[104] officers can willfully violate constitutional rights while misunderstanding—or being entirely oblivious to—the doctrinal or textual underpinnings of that guarantee.[105]

For example, in *United States v. Ehrlichman*, the D.C. Circuit affirmed an 18 U.S.C. § 241 conviction against a government official who intended to authorize out a warrantless search,[106] but did not know that he was violating any law or constitutional provision, as he thought that his actions were protected by an exception to the Fourth Amendment's warrant requirement.[107] John Ehrlichman, a political aide to President Richard Nixon, was the defendant in this case.[108] At issue was his authorization of a warrantless "black bag [search]" of a local psychiatrist's private office.[109] Ehrlichman sought to uncover incriminating information about one of the psychiatrist's patients, Daniel Ellsberg, who had leaked classified information to the press.[110] When defending his decision in court, Ehrlichman asserted that even if the break-in was illegal, he "lacked the specific intent necessary to violate Section 241" because he reasonably believed that the search was authorized by a national security exception to the warrant requirement.[111] The D.C. Circuit rejected this argument, explaining that if a defendant had the purpose "to commit acts which deprive a citizen of interests [that are protected by constitutional rights] . . . there is no 'good faith' defense . . . [because] there is no requirement under Section 241 that a defendant recognize the unlawfulness of his acts."[112] Thus, because Ehrlichman intended to authorize an *action* that deprived the psychiatrist of his Fourth Amendment interests, Ehrlichman had willfully conspired to violate the Fourth Amendment—even though he did not knowingly break any law.[113]

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[103] United States v. Ehrlichman, 546 F.2d 910, 922 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977); United States v. Walsh, 194 F.3d 37 (2d Cir. 1999); United States v. McClean, 528 F.2d 1250 (2d Cir. 1976).

[104] *See generally* Anderson v. United States, 417 U.S. 211, 223–28 (1974) (discussing the willful deprivation of one's constitutional right to an equal vote).

[105] *Cf.* Savoy, *supra* note 38, at 299 ("[I]f the officer is not thinking in constitutional terms, how can he have a purpose to deprive . . . a specific constitutional right? . . . The very concept . . . is highly problematic. No[one] leaves home and says, 'I think I'll violate someone's constitutional rights today.'").

[106] Section 241 was passed alongside Section 242 during the Reconstruction era, and imposes criminal liability upon those who "conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States[.]" 18 U.S.C. § 241. While Section 241 does not contain the word "willfully" within its text, the Supreme Court has held that the specific intent requirement of *Screws* and Section 242 is "derivatively applicable" to Section 241, and vice versa. *Ehrlichman*, 546 F.2d at 921 (citation omitted). Therefore, *Ehrlichman's* discussion of willfulness in a Section 241 context is equally applicable to situations involving Section 242. *See id.* (citation omitted).

[107] *Ehrlichman*, 546 F.2d at 914–17.

[108] *Id.* at 114. *See generally* David Stout, *John D. Ehrlichman, Nixon Aide Jailed for Watergate, Dies at 73*, NEW YORK TIMES, Feb. 16, 1999, https://www.nytimes.com/1999/02/16/us/john-d-ehrlichman-nixon-aide-jailed-for-watergate-dies-at-73.html (discussing details about the Watergate scandal as well as Ehrlichman's involvement in the matter).

[109] *Ehrlichman*, 546 F.2d at 915.

[110] *Id.* at 914–17.

[111] *Id.* at 918.

[112] *Id.* at 922. Under this formulation, if a defendant specifically intended to commit an act that resulted in a deprivation of rights without necessarily knowing that such a deprivation would ensue, their subjective intent to commit that initial action would suffice to demonstrate willfulness—so long as the constitutional right was clearly defined. *Id.* at 922–23. The D.C. Circuit explains that the specific intent element of Sections 241 and 242 contain both a subjective and objective portion. *Id.* Objectively, a judge must make the legal determination that there was a clearly defined and plainly applicable right at issue. *Id.* Subjectively, the defendant must have intended to perform the action that infringed upon interests protected by that clearly defined right. *Id.* at 922.

[113] *Id.* at 920–29.

The Second Circuit came to a similar conclusion in *United States v. McClean*, holding that the intent to engage in conduct that resulted in the deprivation of another's federal rights was sufficient to demonstrate willfulness.[114] The defendants, a group of New York City police officers, had routinely exploited their authority to extort significant sums of money from individuals involved in drug distribution, demanding cash in exchange for leniency or a blind eye.[115] Faced with a "sordid picture of police corruption," the court cast aside the officers' argument that they lacked the specific intent to violate their victims' constitutional rights because they believed their seizures were in compliance with the law.[116] The Second Circuit held that "specific intent on the part of the police officers to deprive persons of federal rights" was unnecessary, and that the officers needed only to intend to perform the action that "ha[d] the effect of such deprivation[.]"[117] Thus, because the defendants intended collect money from the suspected drug dealers, they had demonstrated the willfulness necessary to support a Section 242 conviction.[118] Following this guidance, the unconstitutional consequences of a defendant's action, if that initial conduct was performed intentionally, must also be viewed as intentional.[119]

Again, this approach provides some much needed clarity to the confusion surrounding *Screws*.[120] Determining an officer's specific intent to perform a tangible action, rather than their intention to violate some intangible right, is a much clearer undertaking for judges and juries.[121] Even so, defining willfulness as the specific intent to perform an action that results in a deprivation of rights, regardless of the defendant's knowledge of that ensuing constitutional violation, seems to fly in the face of the *Screws* pronouncement that "something more" is needed for willfulness than "bad purpose or evil intent" alone.[122] After all, if willfulness under Section 242 is defined as the specific intent to perform an action that results in a constitutional violation, then *Screws* should not have resulted in an acquittal, as the Sherriff's beating of Robert Hall was clearly premeditated and intentional.[123]

3. *Scrutinizing the Interpretive Split*

When considering these two definitions of willfulness, it seems difficult to reconcile them with each other, as well as with the Supreme Court's guidance in *Screws*.[124] One approach stands for the idea that an officer's knowing and intentional violation of the law causes any resulting deprivation of rights to be considered willful as well.[125] The other approach instructs that any intentional action, whether or not that act was a knowing violation of a law or constitutional provision, automatically elevates an ensuing constitutional violation to the level of willfulness.[126] The primary difference between these two approaches concerns the defendant's purpose in performing the initial action that resulted in a

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[114] 528 F.2d 1250, 1255 (1976).
[115] *McClean*, 528 F.2d at 1252–54.
[116] *Id.* at 1252.
[117] *Id.* at 1255.
[118] *Id.* at 1253–56.
[119] *Id.* at 1255.
[120] *See* Malone, *supra* note 70, at 211.
[121] *See* Malone, *supra* note 70, at 211.
[122] *Screws,* 325 U.S. 91, 101, 103 (1945); *see also* Malone, *supra* note 70, at 211 ("Thus, while Screws unequivocally requires that defendants have specific intent to violate a federal right, *McClean* expressly rejects such a requirement, equating it with the discredited position that a defendant must be thinking in constitutional terms to violate Section 242.").
[123] *See* Malone, *supra* note 70, at 202.
[124] *See* Malone, *supra* note 70, at 192–93.
[125] *See supra* Section I.B.1
[126] *See supra* Section I.B.2

deprivation of rights, and whether the defendant knew that underlying conduct was illegal.[127] If the defendant did not knowingly break the law, one approach forecloses willfulness under Section 242 while the other still leaves the door open.[128]

While this divergence may seem irreconcilable on paper, the difference between the two approaches is quite blurred in application, as its actual effect on case outcomes is not so clear. For example, if the *Ehrlichman* case been prosecuted using the *Dise* definition of willfulness, a conviction may have still occurred;[129] there was substantial circumstantial evidence indicating that Ehrlichman knew his actions were illegal, and "acted in reckless disregard of the law as he understood it."[130] Furthermore, within the *Dise* opinion, the Third Circuit actually asserted that its definition of willfulness was "consistent with those of a number of federal courts[,]" including the D.C. Circuit's approach in *Ehrlichman*.[131] Indeed, twelve years later in *United States v. Johnstone*,[132] the Third Circuit upheld jury instructions that seemed more consistent with *Ehrlichman* than *Dise*, stating that "it is the Constitution itself that defines the standard for excessive force . . . [and that the violation of another] law is simply of no consequence."[133] The Third Circuit, acknowledging the inconsistency, put it best: "though the charge may not be crystal clear, any confusion is a result of *Screws* itself and not of the charge."[134]

C. *Section 242's Tangible Shortcomings and the Need for State-level Reform*

Although the doctrinal legacy of *Screws* is one of frustration and uncertainty, the decision's practical effects on civil rights enforcement have been quite clear. The specific intent requirement imposed by *Screws* is widely considered as the Achilles heel of Section 242 prosecutions—the reason why prosecutions fail, and also the reason why so few are brought in the first place.[135] While the Department of Justice initially thought that juries would "not be deterred by vague, technical doubts about the 'willfulness' of the defendant's action[,]" their prediction was wrong.[136] After the acquittal

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[127] *See supra* Sections I.B.1, I.B.2.
[128] *See supra* Sections I.B.1, I.B.2.
[129] *Compare* United States v. Ehrlichman, 546 F.2d 910, 914–17 (D.C. Cir. 1976) (discussing the facts of *Ehrlichman*) *with* United States v. Dise, 763 F.2d 586, 587–92 (3rd Cir. 1985) (discussing the Third Circuit's definition of willful intent).
[130] *Dise*, 763 F.2d at 591–92.
[131] *Dise*, 763 F.2d at 592 (citing *Ehrlichman*, 546 F.2d at 921); *see also* United States v. Proano, 912 F.3d 431, 443 n. 6 (7th Cir. 2019) ("[Although o]ther circuit courts have described willfulness in the § 242 context somewhat differently . . . [t]hose definitions are not so dissimilar . . . [as] to cast doubt on our own conclusion[.]").
[132] 107 F.3d 200 (3rd. Cir. 1997).
[133] *Id.* at 210. The court explained that *Dise*'s pronouncement that a knowing violation of law demonstrates willfulness did not *require* a knowing violation of law in order to find willfulness. *Id.* Thus, the court stated that *Dise* did not foreclose that possibility that a defendant acted willfully without knowingly violating a law. *Id.* However, in *Dise*, the court explained that the defendant "could be found to have acted willfully *only* if it found that he knew he was using . . . force beyond that which was permitted to him under the law[.]" 763 F.2d at 592 (emphasis added) (internal quotation marks omitted).
[134] *Johnstone*, 107 F.3d at 210.
[135] Malone, *supra* note 70, at 211; Savoy, *supra* note 38, at 299; Watford, *supra* note 17, at 482; Jacobi, *supra* note 27, at 808–09; Arthur B. Caldwell & Sydney Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Section 242, in Prison Brutality Cases*, 52 GEO. L. J. 706, 708 (1964); Mia Teitelbaum, *Willful Intent: U.S. v. Screws and the Legal Strategies of the Department of Justice and NAACP*, 20 U. PA. J. L. & SOC. CHANGE 185, 195–96 (2018); James P. Turner, *Police Accountability in the Federal System*, 30 MCGEORGE L. REV. 991, 1001 (1999); Taryn A. Merkl, *Protecting Against Police Brutality and Official Misconduct: A New Federal Criminal Civil Rights Framework,* Brennan Center for Justice (April 29, 2021). *See generally supra* note 16 (listing police brutality incidents where the Department of Justice chose not to pursue a Section 242 prosecution because it concluded that it could not prove the willfulness element of a prima facie case).
[136] ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 114 (1947).

in *Screws*, the Department of Justice "revise[d] its judgment concerning the difficulty of convincing a jury of the 'willfulness' of [a defendant's actions] in a [Section 242] case."[137]

From that point forward, federal officials have been extremely reluctant to prosecute officers under Section 242.[138] The confusion surrounding the *Screws* willfulness standard, and the effect of that confusion on judges and juries alike, has created a strong impression of insurmountability.[139] Indeed, the Department of Justice consistently cites the difficulty of proving willful intent as the primary reason for not prosecuting instances of police misconduct.[140] Given the Civil Rights Division's limited resources and inability to pursue cases with low chances of success, the longstanding neglect of Section 242 is not shocking.[141] Nonetheless, with this underutilization also comes underdeterrence, as officers can act with violent discretion, knowing that their chances of criminal punishment are slim.[142]

Efforts to improve Section 242 at the federal level have been largely unsuccessful. In 1961, after the practical effects of *Screws* became apparent, the United States Commission on Civil Rights issued a report that reflected the "consensus among civil rights advocates" that the statute was badly in need of reform.[143] The report proposed a series of changes, chief among which was the enumeration of specific rights that those acting under color of law could not violate.[144] This recommendation was ignored by Congress, and Section 242 remained unchanged.[145] Nearly fifty years later, amid a national reckoning with police brutality and racial inequity, civil rights advocates once again turned their attention to Section 242.[146] Legislators introduced four separate bills that attempted to remedy the statute's shortcomings.[147] The Eric Garner Excessive Use of Force Prevention Act of 2019 proposed an amendment to Section 242 that listed specific actions which would violate one's constitutional right to be free from excessive force.[148] It failed.[149] The George Floyd Justice in Policing Act, introduced in the House of Representatives in both 2020 and 2021, attempted to lower Section 242's mens rea requirement from willfulness to recklessness.[150] It failed both times.[151] Its counterpart in the Senate, the Justice in Policing Act of 2020, fell short as well.[152]

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[137] *Id.* at 114–15.
[138] *See supra* note 16.
[139] Watford, *supra* note 17, at 482 ("It's never been entirely clear how the government is supposed to . . . prov[e wilfullness,] . . . and judges . . . have struggled to formulate comprehensible jury instructions explaining it.").
[140] *See supra* note 16.
[141] *See* Turner, *supra* note 135.
[142] *See* Turner, *supra* note 135; Teitelbaum, *supra* note 135. *See generally* Andrew Ford, *How Criminal Cops Often Avoid Jail*, PROPUBLICA (Sept. 23, 2020), https://www.propublica.org/article/new-jersey-law-says-criminal-cops-should-go-to-jail-records-reveal-they-often-dont (discussing how police officers often avoid accountability for breaking the law).
[143] Teitelbaum, *supra* note 135, at 205–06 (citing U.S. COMMISSION ON CIVIL RIGHTS REPORT: BOOK 5 at 52 (1961)).
[144] Teitelbaum, *supra* note 135, at 205–06 (citing U.S. COMMISSION ON CIVIL RIGHTS REPORT: BOOK 5 at 52 (1961)).
[145] Teitelbaum, *supra* note 135, at 205–06 (citing U.S. COMMISSION ON CIVIL RIGHTS REPORT: BOOK 5 at 52 (1961)).
[146] *See, e.g.,* Merkl, *supra* note 135 (advocating Section 242 reform).
[147] *See supra* note 20.
[148] Eric Garner Excessive Use of Force Prevention Act of 2019, H.R. 4408, 116th Congress (Sept. 9, 2019).
[149] *Id.*
[150] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congress (June 8, 2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (Feb. 24, 2021).
[151] George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Congress (June 8, 2020); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (Feb. 24, 2021).
[152] Justice in Policing Act of 2020, S. 3912 (June 8, 2020). These efforts failed, in large part, due to Congressional gridlock surrounding the polarizing issue of police reform. *See* David Morgan, *U.S. Drive for Police Reform Hamstrung by Gridlock in Congress*, REUTERS (June 23, 2020), https://www.reuters.com/article/us-minneapolis-police-congress/u-s-congress-hits-partisan-gridlock-over-police-reform-idUSKBN23U2BL. Republicans thought that Democratic-backed proposals would

These defeats illustrate the "substantial barriers to transforming federal law[,]" and suggest the need for us to look elsewhere in bolstering police accountability measures.[153] Along these lines, many policymakers, activists, and academics have already shifted their attention to the state and local levels, where sub-national entities can counteract federal policy failures by enacting local solutions that are better suited to the needs of their communities.[154] Such changes would contribute towards "a healthier ecosystem of civil rights enforcement[,]" where states can circumvent federal inadequacies by devising their own accountability measures for the systemic impunity of police misconduct.[155]

II. STATE-LEVEL ALTERNATIVES TO 18 U.S.C. § 242 **[Omitted]**

III. CODIFYING CRIMINAL LIABILITY FOR THE RECKLESS DEPRIVATION OF STATE CONSTITUTIONAL RIGHTS

Since *Screws* was decided, civil rights enforcement has remained in a state of "partial disarray[,]" where scholars, judges, and juries at both levels of government have struggled to decipher the Supreme Court's amorphous definition of willful intent.[156] At the federal level, Section 242's ineffectiveness is well established.[157] Although some circuits have created sharper formulations of the *Screws* willfulness standard, those interpretations are still quite difficult to meet, discouraging federal officials from prosecuting police misconduct in the first place.[158] Likewise, state-level alternatives face many of the same troubles, as state courts have imported the problematic holdings of *Screws* into local jurisprudence.[159] While the Model Penal Code's official oppression law seems better on paper, it is rarely used in practice.[160] Disappointingly, these ineffective deterrents are the best that officials have to work with, as the vast majority of states have no criminal deprivation of rights statute at all.

To fill this gap in civil rights enforcement, and to reinvigorate local mechanisms for police accountability, this Comment urges state lawmakers to enact new state statutes—or amend existing provisions—to prohibit reckless deprivations of state constitutional rights. In relevant part, such a statute might read as follows:

> [Any peace officer[161] who knowingly or recklessly] subjects any [other] person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the

"have a chilling effect on law enforcement." *Id.* Democrats labeled Republican-backed measures as "unacceptably weak." *Id.* Both parties were unable to overcome these differences. *Id.*

153 Reinert, Schwartz & Pfander, *supra* note 23, at 740.

154 Reinert, Schwartz & Pfander, *supra* note 23, at 742–43.

155 Reinert, Schwartz & Pfander, *supra* note 23, at 740–41.

156 Pastor, *supra* note 12, at 204.

157 *See generally supra* Section I (analyzing the shortcomings of *Screws* and Section 242).

158 *See generally supra* Section I (discussing how circuits have split on the meaning of "willfulness").

159 *See generally supra* Section II.A (explaining how *Screws* has impacted the decision-making of state courts).

160 *See generally supra* Section II.B (emphasizing the drawbacks of the Model Penal Code's approach).

161 While the exact language varies from state to state, a "peace officer" is typically defined as a public employee who is empowered to enforce the law and exercise the power of arrest. *See* GA. CODE ANN. § 35-8-2 (2021); *see also, e.g.,* 18 PA. STAT. AND CONS. STAT. ANN. § 501 (2022) (defining a peace officer as "[a]ny person who by virtue of [their] office or public employment is vested by law with a duty to maintain public order or to make arrests"); MD. RULE 4–102 (defining a peace officer as "any . . . person authorized by State of local law to issue citations). The label usually encompasses police officers, corrections officers, investigative officers, and more. *See* GA. CODE ANN. § 35-8-2 (2021).

> Constitution or laws of [this state] . . . shall be [guilty of a felony and] fined under this title or imprisoned . . . or both[.][162]

This amended, state law version of Section 242 (hereinafter "model statute") would offer greater civil rights protections and more potent deterrence against unlawful police behavior. **[Remainder of section omitted]**

A. *Explaining the Proposed Recklessness Standard*

As evidenced by the confusion surrounding *Screws*, specific intent standards have been particularly difficult for courts to apply.[163] Indeed, to be found guilty under Section 242 or any of its state-level alternatives, it is not immediately apparent *what* a defendant must have intended to do, even if the *level* of required intent is supposedly clear. Does the intent to perform an action—assaulting someone, entering a home, or confiscating property—actually show an intent to deprive someone of a constitutional right?[164] Or, does an intent to violate the Constitution require some additional knowledge—that the force was excessive, that there was no warrant, or that there was no probable cause?[165] Perhaps the inquiry should be more objective in nature, focusing on what a reasonable officer would have done in the defendant's place.

This Comment answers those questions by proposing a state-level model statute that utilizes the Model Penal Code's formulation of a recklessness mens rea requirement.[166] Under this standard, officers can be convicted if they knew their conduct carried a significant risk of violating another's state-protected rights, and disregarded that risk by performing that conduct regardless.[167] The risk of a state constitutional violation must be substantial enough where disregarding it would be objectively unjustifiable, and a "gross deviation from the standard of conduct that a law-abiding [officer] would observe in the [defendant's] situation."[168] Therefore, the recklessness standard would be satisfied if a police officer consciously disregarded an objectively unjustifiable risk that their conduct was illegal.[169]

This recklessness standard is significantly lower than the mens rea requirements of Section 242 and its current state-level alternatives.[170] Previously, prosecutors had to prove that an officer

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[162] 18 U.S.C. § 242 (amended to utilize a lowered mens rea standard, restrict liability to peace officers, and incorporate state constitutional law).

[163] *See generally supra* Section I (discussing the confusion surrounding *Screws* and its specific intent standard).

[164] *See generally supra* Section I.B.2 (explaining how some circuits that have interpreted "willfulness" as the intent to do an *action* that results in a deprivation of rights, regardless of one's knowledge of that action's unconstitutionality).

[165] *See generally supra* Section I.B.1 (discussing circuits that have interpreted a "willful" deprivation of rights as requiring a defendant to know that they acted outside of the law).

[166] Although there have been some proposals to lower the mens rea standard of Section 242, those efforts have been confined to the federal level, and largely ignored by Congress. *See* Merkl, *supra* note 135. This Comment seeks to circumvent the federal stagnation surrounding police accountability by proposing a state oriented solution.

[167] Pastor, *supra* note 12, at 171-205; MODEL PENAL CODE § 2.02 (describing the recklessness standard).

[168] *See* MODEL PENAL CODE § 2.02.

[169] *Id.*

[170] *Compare id.* ("A person acts recklessly . . . when [they] consciously disregard a substantial and unjustifiable risk[of depriving someone else of a constitutionally protected right.]") *with Screws*, 325 U.S. at 98–102 (1945) (defining willfulness as the specific intent to deprive another person of an explicit constitutional right).

specifically intended to violate an explicit constitutional right,[171] knowingly broke the law,[172] or intentionally committed an action that violated a constitutional right.[173] Under a lowered recklessness standard, prosecutors only need to show that a police officer knew their conduct *risked* the deprivation of another's state constitutional rights.[174] While a small number of jurisdictions have interpreted their specific intent standard in a way that captures certain forms of reckless behavior, adopting an explicitly defined recklessness standard would provide additional clarity and give officers better notice of the conduct which the model statute forbids.[175] Furthermore, the recklessness standard would explicitly eliminate the "bad faith" threshold for a conviction,[176] and remove the need for a prosecutor to overcome a defendant's assertion of good faith using circumstantial evidence.[177]

For example, consider this hypothetical from David S. Cohen: an overzealous law enforcement agent wants to apprehend a group of drug dealers who live in a large apartment complex, but in the process of trying to find them, that officer illegally searches innocent people and residences.[178] In this situation, the officer acted in good faith, but still behaved in a flagrantly unconstitutional manner—illustrating the abuse of power that a criminal deprivation of rights statute aims to combat.[179] A conviction would be difficult to secure under the traditional *Screws* willfulness standard, as prosecutors would need to demonstrate that the officer specifically intended to violate the constitution or knew their conduct was illegal in some way.[180] On the other hand, under a recklessness standard, prosecutors would only need to show that the officer disregarded a substantial or objectively unjustifiable risk that their conduct was illegal.[181] Prosecutors could demonstrate such recklessness by pointing to the officer's gross deviation from the standard of care that a reasonable law enforcement agent would observe in that situation.[182]

The model statute's recklessness standard would prohibit a much wider range of police misconduct than existing specific intent requirements, and allow state officials to prosecute culpable

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171 Screws v. United States, 325 U.S. 91, 103 (1945).
172 United States v. Dise, 763 F.2d 586, 587–89 (3rd Cir. 1985) (instructing the jury that "[t]he Government has to prove . . . that the defendant used excessive, unreasonable and unnecessary force . . . and at the time he did it, he knew he was using excessive, unreasonable and unnecessary force beyond that which was permitted to him under the law").
173 United States v. Ehrlichman, 546 F.2d 910, 922 (D.C. Cir. 1976).
174 This change would still leave qualified immunity—a significant obstacle to civil police accountability—as a non-issue in criminal deprivation of rights cases. *See generally* Aaron L. Nielson & Christopher Walker, *Qualified Immunity and Federalism*, 109 GEO. L. J. 229, 246–48 (summarizing criticisms of qualified immunity). Any officer who recklessly infringes upon the rights of another by "gross[ly] deviating from the standard of conduct that a law-abiding [officer] would observe" would, by definition, be ineligible for such protection. MODEL PENAL CODE § 2.02. Indeed, by acting recklessly, officers would be violating a "clearly established statutory or constitutional right[] . . . [that] a reasonable person would have known[.]" Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See generally* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2104–07 (2018) (explaining the doctrine of qualified immunity).
175 *See Ehrlichman*, 546 F.2d 922–23; *see also* Pastor, *supra* note 12, at 175 (explaining how some courts have interpreted specific intent to include actions performed in reckless disregard of the constitution).
176 *Cf. Screws*, 325 U.S. at 103 (stating that willfulness requires "something more" than "bad purpose or evil intent," and that Section 242 was not meant to be a trap for officers acting in good faith); *but cf. Ehrlichman*, 546 F.2d at 922 (stating that there is no "good faith" defense to a Section 242 charge).
177 *See Dise*, 763 F.2d at 587–89 (discrediting a defendant's claim of good faith due to circumstantial evidence which indicated that he knew of the unlawfulness of his actions).
178 Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
179 Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
180 Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
181 Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
182 MODEL PENAL CODE § 2.02.

police officers without punishing officers who behaved responsibly.[183] Importantly, not all police actions infringing on state constitutional rights would rise to the level of recklessness.[184] So long as police officers acted reasonably, or only deviated slightly from their duty of care, they would not be at risk of prosecution.[185] Thus, a recklessness standard would encourage law enforcement agents to exercise restraint without forcing them to be inordinately cautious—only punishing the blameworthy officers who disregarded a substantial risk of illegality while depriving others of their constitutionally protected rights. Indeed, had a recklessness standard been in place at the federal level, the police officers who murdered Robert Hall, Amadou Diallo, and so many others would not have escaped justice so easily. [186] By adopting this Comment's recommendation, state legislatures can take the initiative in promoting accountability, deterring unlawful police behavior, and protecting their citizens from the dangers of unchecked police power.

B. *The Value of Federalism and State Constitutional Rights* **[Omitted]**

C. *Feasibility & the Importance of Experimentation* **[Omitted]**

IV. OBJECTIONS

This Comment's proposed reinvigoration of state-level criminal deprivation of rights statutes is likely to meet resistance on three major grounds. This Part addresses each objection in turn. **[Remainder of section omitted]**

A. *Criminal Accountability as a More Effective Deterrent than Civil Liability*

At the federal level, Section 242 receives considerably less attention and usage than its civil counterpart, Section 1983.[187] Likewise, states have shown far more willingness to tinker with civil causes of action against the police deprivations of rights than to experiment with expanded criminal liability.[188] To some extent, this lopsidedness makes sense. Section 1983 and its state level analogues provide various benefits and remedies that a Section 242 analogue cannot. Namely, under the civil framework of civil rights enforcement, victims of police brutality can bring private suits on their own volition, collect monetary damages, obtain injunctive relief, and more.[189] But, if the goal is deterring unconstitutional police behavior, then this preference is unfounded.

The weight of available evidence indicates that civil liability, in its current form, "does not play a large role in the day to day thinking of the average police officer."[190] Studies show that other concerns are much more prominent in the mind of a law enforcement agent than the threat of civil

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[183] Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
[184] Cohen, *supra* note **Error! Bookmark not defined.**, at 189.
[185] *See generally* DRESSLER & GARVEY, *supra* note 72, at 169–72.
[186] Screws v. United States, 325 U.S. 91, 138 (1945) (Murphy, J., dissenting) ("[The officers] knew that they lacked any mandate or authority to take human life . . . that their excessive and abusive use of authority would only subvert the ends of justice."); Pastor, *supra* note 12, at 171-205 (claiming that the Department of Justice would have succeeded in prosecuting Amadou Diallo's killers under a recklessness mens rea standard).
[187] *See* Reinert, Schwartz & Pfander, *supra* note 23, at 739 n. 2. *See generally* Smith, *Beyond Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 121–22 ("Civil accountability is rare . . . [but c]riminal liability. . . is rarer.").
[188] *See* Reinert, Schwartz & Pfander, *supra* note 23.
[189] *See* CONGRESSIONAL RESEARCH SERVICE LSB10486, Congress and Law Enforcement Reform: Current Law and Recent Proposals (2020).
[190] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 353 (citation omitted).

accountability.[191] Thus, it seems unlikely that the threat of being sued serves any deterrent purpose whatsoever.[192] Even when police officers are sued, they rarely pay for their own legal representation, and are almost never personally responsible for the settlements or judgments entered against them.[193] To this point, Professor Joanna Schwartz found that local governments paid 99.98% of all dollars recovered by plaintiffs in civil deprivation of rights suits from 2006–2011, even in jurisdictions where such indemnification was prohibited.[194]

Despite this financial burden, most local police departments do not collect or analyze data about the lawsuits brought against their officers, leaving higher-ups oblivious to the number of suits filed per year and the total amount of money they paid out as a result.[195] If the deterrent effect of civil liability is meant to center around the adverse financial impact it would have on police departments, then the first step would be for agencies to be aware of the costs of such lawsuits in the first place.[196] Furthermore, with the exception of highly publicized cases, law enforcement agents "rarely suffer any financial or job-related costs [from] being sued."[197] Together, all of these shortcomings support the unfortunate conclusion that civil suits just do not work as deterrents to police misconduct.[198]

None of those drawbacks are associated with the deterrent effects of criminal accountability. When a police officer is convicted, they personally suffer the consequences; no one can serve their sentence for them. Moreover, for many officers, the prospect of serving time in prison alongside individuals they helped incarcerate is quite daunting.[199] Additionally, the practice of indemnification is almost nonexistent in cases where police officers are convicted of a crime.[200] This forces police officers to personally pay for the costs associated with their unconstitutional behavior.[201] Furthermore, this Comment's model statute classifies the criminal deprivation of rights as a felony.[202] If convicted, an officer would suffer more job-related consequences than if they were named as a defendant in a civil suit, as a felony charge renders individuals ineligible to serve as law enforcement agents in many

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[191] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 353–54 (citing various studies about the day-to-day thinking of law enforcement agents).
[192] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1811–13 (2018).
[193] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-making*, 57 UCLA L. REV. 1023, 1045–52 (2010); *see also* 51 A.L.R. Fed. 285 (1981) (explaining that police departments and local governments, rather than the offending officer, often have to bear the costs of paying damages in civil rights suits under Section 1983).
[194] Joanna C. Schwartz, *Police Indemnification*, 89 NYU L. REV. 885, 885 (2014). Indemnification is when a police department, rather than police officer, pays financial costs associated with that officer's misconduct. *See id.*
[195] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 355–56.
[196] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 355–56.
[197] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 355–56.
[198] *See* Schwartz, *After Qualified Immunity*, *supra* note **Error! Bookmark not defined.**, at 355–56. *See generally* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753 (1993) (discussing the ineffectiveness of Section 1983 in deterring police misconduct).
[199] *See e.g.,* Collin Campbell, *Baltimore Police Union: Cops more afraid of going to jail than getting shot*, BALTIMORE SUN (May 28, 2015), https://www.baltimoresun.com/news/crime/bs-md-ci-fop-statement-20150528-story.html ("The president of the Baltimore police union . . . said that . . . city police are more 'afraid; of being arrested than shot on duty."); Miles Corwin & David Ferrell, *Prison: A Cop's Worst Nightmare: In the Inmate Caste System, Ex-officers Rank Down Near Child Molesters. They Often are Sentenced to a Life of Fear--Shunned at Best, Attacked at Worst. Officials must decide how to Protect Koon, Powell.*, LOS ANGELES TIMES (Aug. 5, 1993), https://www.latimes.com/archives/la-xpm-1993-08-05-mn-20657-story.html ("For a [police officer,] prison is a miserable life made even more miserable . . . [i]t's a cop's worst nightmare.").
[200] *See* Howard Friedman, *To Protect and Serve?*, 47 TRIAL 14, 16 (Dec. 2011) ("[M]any police departments refuse to indemnify officers for criminal conduct, even if it was in the line of duty.").
[201] *See id.*
[202] *See supra* Section III.

jurisdictions.[203] Thus, the threat of criminal accountability may factor into day-to-day police decision-making more than the potential for civil liability.

The reinvigoration of criminal liability as a deterrent to police misconduct is not meant to come at the expense of robust civil remedies. To the contrary, a healthy ecosystem of civil rights enforcement requires vigorous mechanisms for accountability in both the civil and criminal arenas. Ideally, both avenues would be strengthened. Nevertheless, criminal liability has been heavily underutilized as a tool for deterring police misconduct.[204] After all, deterrence works best when the perceived likelihood of being convicted is high.[205] This Comment's proposal would significantly enhance that perception—expanding the scope of punishable misconduct, and putting officers on alert that reckless deprivations of rights will no longer be tolerated under the law.[206]

B. *Protecting Broad Rights Instead of Criminalizing Specific Actions* **[Omitted]**

C. *Addressing Abolitionist Concerns* **[Omitted]**

CONCLUSION **[Omitted]**

APPENDIX: CRIMINAL STATUTES ON THE DEPRIVATION OF STATE CONSTITUTIONAL RIGHTS **[Omitted]**

[203] *See e.g.,* Automatic Disqualifiers, Government of the District of Columbia, Join Metropolitan Police Department, https://joinmpd.dc.gov/basic-page-2020/automatic-disqualifiers (listing "any conduct which would constitute a felony" as an automatic disqualifier from being hired as a police officer in Washington, D.C.); Employment Disqualifiers, Georgia Department of Public Safety, https://dps.georgia.gov/dps-careers/employment-disqualifiers (listing "any felony conviction" as an automatic disqualifier for employment as a police officer in Georgia).

[204] *See supra* Section I.

[205] *See* FIVE THINGS ABOUT DETERRENCE, DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE (2016). https://www.ojp.gov/pdffiles1/nij/247350.pdf.

[206] *See supra* Section III.